Supreme Court, U.S.
FILED

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No. 03-

IN THE

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

HONAS RICHARDS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 14, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

65 pp

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit erred when it held, in conflict with numerous other courts, that *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), abrogated the proximate cause rule of *Davis* v. *Wolfe*, 263 U.S. 239 (1923), in cases arising under the Federal Employers' Liability Act, and thereby overruled *sub silentio* decades of Supreme Court precedent.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

RULE 29.6 STATEMENT

Petitioner Consolidated Rail Corporation ("Conrail") is a jointly owned subsidiary of CSX Corporation and Norfolk Southern Corporation, both of which are publicly traded corporations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Consolidated Rail Corporation ("Conrail") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is reported at 330 F.3d 428 (6th Cir. 2003), and is reproduced in the Petition Appendix ("App.") at 1a-15a. The judgment of the United States District Court for the Southern District of Ohio is not officially reported. It can be found at 2001 WL 1681107 (S.D. Ohio Sept. 10, 2001), and is reproduced at App. 16a-27a.

JURISDICTION

The judgment of the Sixth Circuit was entered on May 28, 2003. App. 1a. The Sixth Circuit denied rehearing en banc on July 17, 2003. App. 28a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, and the Federal Safety Appliance Act, 49 U.S.C. §§ 20301-20306, are reproduced at App. 29a-32a.

STATEMENT OF THE CASE

In *Davis* v. *Wolfe*, 263 U.S. 239 (1923), this Court reconciled a number of its prior precedents under the Federal Employers' Liability Act ("FELA") involving allegations of injuries caused by a railroad's violation of the Federal Safety Appliance Act ("SAA"). This Court held that "an employee

cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Id.* at 243. The Sixth Circuit has now held that this rule, which had previously been followed in that court, "no longer is good law" after *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957). App. 14a. The Sixth Circuit had no authority to trench upon this Court's exclusive prerogative to determine the continuing validity of its precedents. Moreover, its decision is based upon a fundamental misconception of *Rogers* that is the source of a mature conflict among the federal courts of appeals and state supreme courts. *Rogers* has been interpreted by some courts, including the court below, as having instituted a new test of legal causation under FELA (and thereby overturning *sub silentio* decades' worth of this Court's prior precedents), while other courts have concluded that *Rogers* did not change the longstanding proximate cause standard.

The question presented—*viz.*, the standard of causation under FELA—is an issue of fundamental importance. This Court has not squarely addressed FELA causation in the nearly 50 years since it decided *Rogers*, and this Court should not permit the division and confusion in the lower courts to persist further. This conflict—ample reason for this Court to grant review under any circumstances, see Sup. Ct. R. 10(a)—is particularly significant where FELA is concerned. FELA is the exclusive remedial scheme for practically all railroad workplace injuries. See 45 U.S.C. § 51. Because of FELA, there is no worker's compensation scheme for railroad employees. *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 538-39 (1957) (Frankfurter, J., dissenting). Moreover, FELA broadly preempts state tort statutes that would otherwise apply to such injuries. *Mondou* v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1, 55 (1912).

Accordingly, the causation standard at issue here implicates nearly every case involving an employee's injury while employed by a railroad.

A. Statutory Background

Section 1 of FELA makes "[e]very common carrier by railroad ... liable in damages" for the injury or death of any employee employed in interstate commerce that "result[s] in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. Absent an express statutory departure, the requisite elements of a FELA cause of action are determined by the common law "'as established and applied in the federal courts.'" *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949).

In addition to FELA, Congress enacted two railroad safety statutes during the late nineteenth and early twentieth centuries that regulate aspects of railroad operation and maintenance: (1) the Boiler Inspection Act ("BIA"), 49 U.S.C. §§ 20701-20703, which mandates various safeguards for railroad locomotives and boilers; and (2) the SAA, *id.* §§ 20301-20306, which imposes similar requirements for designated safety devices, including—as relevant here—a train's brakes, *id.* § 20302(a)(4), (5).[1]

Violations of the BIA or SAA are actionable under FELA. *Urie*, 337 U.S. at 188-89. "The duty imposed is an absolute one and the carrier is not excused by any showing of care, however assiduous." *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938). A violation of either statute alone "suppl[ies] the wrongful act necessary to ground liability under the F.E.L.A.," leaving the plaintiff to prove only causation and damages. *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 434-35 (1949). Furthermore, while the general rule under FELA is that, if the employee's contributory negligence is proven, "damages shall be diminished by the jury in

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[1] Those provisions were originally codified at 45 U.S.C. § 1 *et seq.*, but were recodified in Title 49 in 1994.

proportion to the amount of negligence attributable to such employee," that rule does not apply when the jury finds a violation of the safety statutes. 45 U.S.C. § 53; *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 437 (1958).

B. Factual Background

This case arises out of an injury sustained by Plaintiff-Respondent Honas Richards while walking along a railroad track and inspecting a train.

On April 30, 1999, Richards reported to work at the Buckeye yard in Columbus, Ohio at approximately 10:00 p.m. He performed his regular duties as a conductor and assisted in coupling the engine to the train and checking the brakes. Sixth Circuit Amended Joint Appendix ("JA") 81-84. Richards's train left the yard on its way to Cincinnati, Ohio around midnight. JA85.

Approximately 30 minutes after leaving Buckeye yard, the train went into "emergency" and came to a complete stop. *Id.* Richards was not injured by the emergency stop. Richards took at least 20 minutes to prepare to inspect the train for the cause of the sudden stop. Following that delay, he exited the train, and made his inspection. JA89. In so doing, Richards searched for derailed cars, load shifts, or any other reason why the train had stopped, including an air leak in the brake system. JA89-90.

It was during the course of this subsequent inspection that Richards injured his back. Richards described the incident as follows:

> I was walking east stopping occasionally to glance underneath the freight cars to see if they were still sitting on top of the rail and all at once, as I recall, I planted my right foot and was about to make a step with my left foot and all at once there was nothing underneath my right foot. And since I was on a severe slope from left to right, high on the left and low on the right, and the

> weight had been on my right foot and now there's nothing underneath my foot, I had the sensation I was going to fall on top of my head. Just roll over on top of my head. So I just rolled around to square my feet up on the bank.

JA91.

Richards was unable to explain what caused him to lose his balance. JA96. He testified that the area where he almost fell was not slippery, nor were there any weeds or trees. JA96-97. And, although there were pieces of wood or metal in the area, he stated that he was able to step around those items as he walked along the ballast. JA96.[2]

After Richards's injury, he continued to inspect the train, JA92-93, but was unable to locate anything unusual to explain why the train had stopped. JA94-95, 99. He returned to the engine without making any repairs, and the train proceeded on its route. JA99-101.

C. Proceedings Below

1. Richards brought suit against Conrail, in which he alleged violations of FELA, the BIA and the SAA. JA6-9. In his complaint, he alleged two negligent acts by Conrail: First, that Conrail was negligent for creating the ground condition that caused his feet to give way. JA8 ¶¶ 10-11. Second, Richards asserted, Conrail was liable under the SAA, on the theory that the train had a defective control valve—which caused the emergency stop—which caused him to inspect the train—which caused him to walk along the tracks—during the

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[2] Later, Richards attempted to retreat from this testimony. In an affidavit opposing Conrail's motion for summary judgment, he claimed that he fell as a result of "road ballast [that had] shifted or collapsed. JA197 ¶ 21. He further asserted that he would not have fallen if he had been walking on "yard ballast"—which is composed of smaller stones that are more tightly packed, and that the road ballast was used on the track because it costs less. JA196-97 ¶¶ 12-15, 21. The district court properly rejected this effort to manufacture an evidentiary dispute. App. 21a-22a.

course of which he sustained his injury. Thus, he asserted, the defective control valve caused his injuries. *Id.*

Conrail moved for summary judgment, which was granted. App. 27a. On Richards's first theory, the district court concluded that Richards had failed to present any evidence that Conrail had negligently created an unsafe ground condition; in his deposition, after all, he had specifically testified that he did not know what caused him to fall. The court properly recognized that Richards could not defeat summary judgment by filing an affidavit that contradicted his own prior deposition testimony. *Id.* at 21a-23a.

The court also granted summary judgment on Richards's SAA claim. It concluded that Richards had presented inadequate evidence of a safety defect—Richards had simply opined that a defective control valve "'must have'" caused the train to go into emergency. App. 24a-25a. Moreover, even if there were a defective valve, the court concluded Richards had "failed to show that his injury was causally linked to the allegedly defective control valve." *Id.* at 26a. The trial court relied upon *Reetz* v. *Chicago & Erie Railroad*, 46 F.2d 50 (6th Cir. 1931), which had applied the FELA causation standard this Court established in *Davis*: "'an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury.'" 46 F.2d at 51 (quoting *Davis*, 263 U.S. at 243). *Reetz* applied *Davis* to deny recovery where a defective safety appliance was the reason a train had stopped, thus creating the "incidental situation" in which the plaintiff was injured, but was not itself the "efficient cause" or "instrumentality" causing the injury. *Id.* at 52. On the authority of *Reetz*, the trial court found no causation as a matter of law:

> Plaintiff's slip while walking the track was only incidentally caused by the alleged appliance violation;

> the injury was not the 'direct or efficient' cause of any alleged appliance violation. As in *Reetz*, although Plaintiff would not have been walking the track to inspect but for the allegedly defective appliance, his subsequent slip and injury bears too tenuous a connection with the defective appliance so as to give rise to liability.

App. 27a.

2. Richards appealed only the judgment on his SAA claim to the Sixth Circuit. App. 2a n.1. Thus, there was no claim before the Sixth Circuit—and no argument remains in this case—that negligently maintained ground conditions caused his injury. The *only* surviving allegation was—and is—that the train's allegedly defective brakes caused his injury.

The Sixth Circuit reversed. First, on the issue of whether Conrail violated the SAA, it accepted as adequate for summary judgment purposes Richards's testimony that the emergency stop "'must have been'" caused by a defect in the train's air brakes. App. 6a.

Second, on the issue of causation, the Sixth Circuit overruled *Reetz*, stating that the causation standard it applied had "been called into question by the United States Supreme Court's holding in *Rogers*." App. 2a. It acknowledged that

> [p]rior to *Rogers*, several courts analyzed the issue of causation by distinguishing situations where the defective appliance was "the cause of or the instrumentality through which the injury [was] directly brought about" from instances where the defect merely was incidental in creating the condition in which the plaintiff was injured.

Id. at 8a-9a (second alteration in original). It further noted that even after *Rogers* the Sixth Circuit itself had applied this rule to deny recovery where the SAA violation was not a

contributory proximate cause of the injury. *Id.* at 9a-10a.[3] But, according to the Sixth Circuit, that causation standard was inconsistent with *Rogers*, which it interpreted as having established a "relaxed standard" of causation "requir[ing] a plaintiff alleging a FELA violation to offer 'more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more.'" *Id.* at 8a; see also *id.* at 14a (the test is whether "a reasonable jury could conclude that the defective appliance played *any* part, even the slightest, in bringing about the plaintiff's injury"). The Sixth Circuit thus held that "in light of *Rogers* ... *Reetz* no longer is good law." *Id.* at 14a. Applying the standard it derived from *Rogers*, the Sixth Circuit concluded that even the attenuated link between the alleged defect in the brakes (which was never discovered, and established only by Richards's testimony) and his slip and fall on the railroad tracks, was enough to establish liability. The court acknowledged as a theoretical matter that there must be some outer boundary to causation, *id.* at 14a n.5, but concluded nonetheless that the series of events in this case fell within that outer limit.

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[3] As the court of appeals noted, App. 9a-10a, the decision below is only the latest episode in a long-running conflict within the Sixth Circuit on this issue. On the one hand, after *Reetz*, the Sixth Circuit had previously held that *Davis* v. *Wolfe* and other pre-*Rogers* decisions remain good law, and that a FELA plaintiff must demonstrate proximate cause. *Green* v. *River Terminal Ry.*, 763 F.2d 805, 810 (6th Cir. 1985); *Black* v. *Penn Cent. Co.*, 507 F.2d 269, 271 (6th Cir. 1974) (citing *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 523 (1949)). Yet it has also held that "negligence of an employer [does] not have to be the sole cause *or 'the proximate cause'* of [an] injury in order to justify recovery." *Hausrath* v. *New York Cent. R.R.*, 401 F.2d 634, 637 (6th Cir. 1968) (emphasis added); see also *Tyree* v. *New York Cent. R.R.*, 382 F.2d 524, 529 (6th Cir. 1967) ("it would be better in Federal Employers' Liability Act cases if no mention of proximate cause whatever was made to the jury").

REASONS FOR GRANTING THE WRIT

In the decision below, the Sixth Circuit improperly held that the FELA proximate causation rule established by this Court in *Davis* v. *Wolfe*, 263 U.S. 239 (1923), and previously followed in that circuit, "no longer is good law" in light of *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957). App. 14a. Certiorari is justified because the Sixth Circuit has committed the cardinal error of discarding precedent of this Court as superseded, which this Court has declared to be its exclusive prerogative. *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Just as fundamentally, nothing in *Rogers*—which simply vindicates the rule that a railroad can be held liable under FELA if its negligence is a contributory (and not just the sole) proximate cause of an employee's injury—purports to overrule the longstanding rule of *Davis* and numerous other decisions of this Court defining FELA causation. Indeed, *Rogers* specifically relies on precedents that restated the *Davis* rule. The petitioner in *Rogers* did not ask this Court to overrule prior precedent, and the strong policy of *stare decisis* in statutory interpretation forbids any inference that in *Rogers* this Court *sub silentio* overruled decades of causation precedents. The lower courts are divided over the effect of *Rogers* on rules of proximate causation, and this Court should act now to clarify this critical issue that affects jury instructions and liability in virtually every case arising under FELA.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH BINDING SUPREME COURT PRECEDENT, WHICH IT DEEMED TO BE OVERRULED.

Under FELA, a railroad is liable in damages for an injury to an employee engaged in interstate commerce "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. The

long established standard of causation under FELA, set forth in numerous cases of this Court, is proximate cause: the plaintiff must prove that "negligence was the proximate cause in whole or in part" of the employee's injury. *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944).[4] Accordingly,

> "[T]o warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Brady v. *Southern Ry.*, 320 U.S. 476, 483 (1943).

The same rule applies for SAA violations as for any other claim of negligence. Liability does not flow simply from a violation of the SAA, for "the test of causal relation stated in the Employers' Liability Act is applicable." *Carter*, 338 U.S. at 434. Thus, the right of recovery against the railroad is limited to an "injury the proximate cause of which was a failure to comply with the requirement of the Act." *Brady*, 303 U.S. at 15 (internal quotation marks omitted); *St. Louis & S.F. R.R.* v. *Conarty*, 238 U.S. 243, 249 (1915); *Lang* v. *New York Cent. R.R.*, 255 U.S. 455, 461 (1921); *Louisville &*

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[4] *See, e.g., Lang* v. *New York Cent. R.R.*, 255 U.S. 455, 461 (1921) (reversing for lack of evidence of proximate cause); *St. Louis-S.F. Ry.* v. *Mills*, 271 U.S. 344, 347 (1926) (same); *Northwestern Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934) (same); *see also, e.g., St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913); *Davis* v. *Kennedy*, 266 U.S. 147, 148 (1924); *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Goneau*, 269 U.S. 406, 409-10 (1926); *New York Cent. R.R.* v. *Ambrose*, 280 U.S. 486, 489 (1930); *Swinson* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935); *Brady*, 303 U.S. at 15; *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 67 (1943); *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 523 (1949); *Urie*, 337 U.S. at 195; *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949); *Carter*, 338 U.S. at 435; *Brown* v. *Western Ry.*, 338 U.S. 294, 297-98 (1949).

Nashville R.R. v. *Layton*, 243 U. S. 617, 621 (1917) ("carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty").

In *Davis*, this Court undertook to reconcile its various SAA precedents applying the rule of proximate cause, and stated the following standard:

> The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, *but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury*; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.

263 U.S. at 243 (emphasis added).

In *Reetz* v. *Chicago & Erie Railroad*, 46 F.2d 50 (6th Cir. 1931), the Sixth Circuit was confronted with a claim that after a train had stopped because of a failed safety appliance, the railroad should be absolutely liable under the SAA for a subsequent injury to a crew member who had fallen on the tracks while inspecting the train. The court of appeals stated that after *Davis*, the law of causation for such alleged SAA violations "is, we think, clear." *Id.* at 51. The *Reetz* court went on to quote the holding of *Davis* above, and to examine cases applying the *Davis* rule in noncollision cases. *Id.* at 51-52. Following *Davis*, the *Reetz* court held that

> where there has been a failure of a required appliance, there is liability only where the failure of the appliance

> not only creates a condition under which, or an incidental situation in which the employee is injured, but where the defective appliance is itself an efficient cause of or the instrumentality through which the injury is directly brought about.

Id. at 52. The *Reetz* court held that the SAA violation resulting in stoppage of the train created an "incidental situation" in which the plaintiff was injured in walking along the tracks, "but the defective appliance bore no other relation to the injury." *Id.*

Notwithstanding that *Reetz* simply applied the rule established by this Court in *Davis*, the Sixth Circuit below has now improperly held that the rule of *Reetz*, and logically the rule in *Davis*, are "no longer ... good law" in light of *Rogers*. App. 14a. The court below pointed to the holding of *Rogers* that under FELA "'the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Id.* at 7a (quoting *Rogers*, 352 U.S. at 506-07). The Sixth Circuit held that the distinction between injuries from an "incidental situation" created by an SAA violation, and injuries caused by the defective appliance itself, did not survive *Rogers*, *id.* at 14a—even though this distinction was drawn in *Davis* itself, 263 U.S. at 243, and *Rogers* never hinted at overruling *Davis*.

Certiorari should be granted simply because the Sixth Circuit did not have authority to depart from the *Davis* rule in deciding this case, regardless of the effect of *Rogers*. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484; *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) ("it is this Court's prerogative alone to overrule one of its precedents").

Equally important, this Court's review is necessary because the Sixth Circuit's decision is based on a wholesale misreading of *Rogers*. *Rogers* did not overrule *Davis* or any of the numerous precedents of this Court establishing the rule of proximate cause under FELA. Rather, *Rogers* rejected a particular common-law conception of "proximate cause" that requires a showing that the railroad's wrongful act was the "sole, efficient, producing cause of injury." 352 U.S. at 506. That precise formulation was contrary to both the plain language of FELA and this Court's precedents. *Rogers* simply made clear that in circumstances where the jury could find either the employee's or the railroad's negligence to be the legal cause of the injury, the claim against the railroad had to go to a jury even if the railroad's contribution to the injury was slight. *Id.*

Even before *Rogers*, this Court had not hesitated to overrule courts that used language of "proximate cause" in this fashion to deny plaintiffs a jury determination of their FELA claim against the railroad. Thus, in *Coray* v. *Southern Pac. Co.*, 335 U.S. 520 (1949), the lower court had held that a railroad's SAA violation (which caused a freight train to come to a sudden stop because of a brake malfunction) was not the proximate cause of the employee's death; it had reasoned that, because the employee could have avoided the accident if he had not been negligent in failing to brake the motor car that was following the train on the same tracks, the railroad's violation of the SAA was only a "'cause' in the 'philosophical sense'" of the fatal accident. In reversing, this Court held that "the introduction of dialectical subtleties can serve no useful interpretative purpose," given FELA's plain declaration "that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained." *Id.* at 523-24. But, in overruling the lower court's *application* of the proximate-cause doctrine to the facts of that case, this Court in *Coray* explicitly stated that the proximate cause standard of *Davis* remained the rule

under FELA; it held that "petitioner was entitled to recover if this defective equipment was the sole *or a contributory proximate cause* of the decedent employee's death. *Davis v. Wolfe*, 263 U.S. 239, 243; *Spokane & I.E.R. Co. v. Campbell*, 241 U.S. 497, 509-10." *Coray*, 320 U.S. at 523 (emphasis added).

Rogers, like *Coray*, was a case in which the state court had improperly taken the case away from the jury even though there was evidence that the railroad's negligence was one of two possible legal causes of his injury. In *Rogers*, the employee had been burning weeds on a sloping track bed. When a train passed, it fanned the flames of the fire he had created, and forced the employee back onto a culvert where he slipped on gravel and fell off the culvert, injuring himself. The employee adduced evidence that the railroad was negligent in requiring him to work near the tracks where passing trains could fan the flames around him, and in failing to maintain the surface of the culvert; the railroad countered with evidence that the plaintiff was negligent in not watching his fire. 352 U.S. at 502-04. This Court expressly stated that, on the evidence presented, the jury could have found either the employee or the railroad to have been the legal cause of the injury. *Id.* at 504.

But even though the jury found for the plaintiff, the Missouri Supreme Court reversed, in part on the ground that the employee's "conduct was at least as probable a cause for his mishap as any negligence of the [railroad], and that in such case there was no case for the jury." *Id.* at 505. The state court had erroneously ruled that "there is no jury question in actions under this statute ... unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected." *Id.* at 505-06. According to this Court, the lower court improperly invoked "language of proximate causation which makes a jury question dependent upon whether the jury may find that *the defendant's negligence was the sole, efficient, producing*

cause of injury." *Id.* at 506 (emphasis added). A rule that the railroad's negligence must be "the sole, efficient, producing cause of injury" is contrary to the statutory directive that renders railroads liable if they are a partial cause of the employee's injury. 45 U.S.C. § 51. Accordingly, this Court held that, "[u]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506 & n.11 (citing *Coray*, 335 U.S. 520 (1949)). If that test is met, "a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." *Id.* at 507.

There is no colorable reading of *Rogers* as overruling the *Davis* causation standard. Rather, *Rogers* held that when there is evidence sufficient to support a verdict against the railroad (*i.e.*, to support a finding that the railroad's negligence was a legal cause of the injury), but also evidence to support a finding that the plaintiff's negligence was the cause of the injury, *id.* at 504, the plaintiff's claim against the railroad must go to the jury if there was any evidence that the railroad's negligence "played any part, even the slightest," relative to the employee's negligence in causing the employee's injury, *id.* at 506. The existence of a jury question was not "dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Id.* *Rogers* was not creating new law; it simply restated settled law under FELA for cases involving multiple causation. See, *e.g.*, *Hines* v. *Sweeney*, 201 P. 165, 170 (Wyo. 1921) ("Under this act the railroad company is liable, if its negligence contributes proximately to the injury, no matter how slightly, and no matter how great may be the negligence of the employee."); *New York Chi. & St. Louis R.R.* v. *Niebel*, 214 F. 952, 955 (6th Cir. 1914) (a railroad "is liable, if through other employés it is guilty of any causative negligence no matter how slight in comparison to

that of plaintiff"); *Atlantic Coast Line R.R.* v. *McIntosh*, 198 So. 92, 96 (Fla. 1940) (Brown, J., dissenting in part and expressing the opinion of the court with regard to this issue). More particularly, nothing in *Rogers* questions the longstanding FELA rule for determining the threshold question of when a railroad's negligence is a legal cause of the injury: namely, whether the injury is "'the natural and probable consequence of the negligence or wrongful act,'" *Brady*, 320 U.S. at 483. The railroad's wrongful act must be "a proximate cause of the accident which results in his injury," and not "merely create[] an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Davis*, 263 U.S. at 243.

Rogers itself confirms this understanding. It explicitly derives its "test of a jury case" from *Coray*, see *Rogers*, 352 U.S. at 506 & n.11, and *Coray* (as noted above) reaffirms, citing *Davis*, that the railroad's negligence must be either "the sole or a contributory proximate cause" of the employee's injury." *Coray*, 320 U.S. at 523. Moreover, the *Rogers* Court observed in a footnote that in cases involving violations of the SAA, the jury could not consider the plaintiff's contributory negligence, and "[t]he only issue then remaining is causation," citing *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430 (1949). *Rogers*, 352 U.S. at 507 & n.13. *Carter* (quoting *Coray*, 335 U.S. at 523) likewise holds that the railroad can only be held liable if "the jury determines that the defendant's breach is 'a contributory proximate cause' of injury." *Carter*, 338 U.S. at 435. Indeed, this Court has recognized that *Davis* remains good law in a case decided after *Rogers*. *Kernan*, 355 U.S. at 434.

It is significant that none of the dissenting justices in *Rogers* read that case as a sweeping abrogation of prior precedent regarding FELA's causation standard. Justice Frankfurter would have simply dismissed the writ as improvidently granted because he regarded Rogers as yet another "insignificant" FELA case about the sufficiency of

the evidence, of which the Court had taken many in that period. *Ferguson*, 352 U.S. at 546 (Frankfurter, J., dissenting).[5] He noted that, although the Act abolished certain defenses, it was the "historic cause of action for negligence as it developed from the common law," *id.* at 538, with the proviso that "on the question of causality, the statute had tried to avoid issues about 'sole proximate cause,' meeting the requirement of a causal relation with the language that the injury must result 'in whole or in part' from the employer's negligence," *id.* at 538 n.7. It is thus clear that Justice Frankfurter gave *Rogers* the interpretation set forth above, and did not understand the majority to have abolished proximate cause in contravention of existing precedent. Justice Harlan agreed with Justice Frankfurter that the case never should have been granted, but felt compelled to reach the merits. *Id.* at 559-62 (Harlan, J., dissenting). But he dissented simply because he viewed the Court as substituting its judgment for the lower court's, and alternatively as applying a sufficiency-of-the-evidence standard inconsistent with typical common-law review of jury verdicts. *Id.* at 562-64.

Nor did the petitioner in *Rogers* ever ask the Court to overrule *Davis* or any other precedent of this Court establishing proximate cause as the FELA standard. His position was simply that the railroad's "negligence was the proximate cause of petitioner's injury," and that by allowing recovery for injuries caused "in part" by the railroad's negligence, FELA had "broadened" the causation standard from "the old concept of proximate cause," wherein "th[e] cause must have been direct, the complete, the responsible, the efficient cause of the injury." Brief for Pet'r, at 4, 24-25, *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) (No. 28)

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[5] Justice Frankfurter's dissent in *Ferguson* also applied to *Rogers* and two other cases. 352 U.S. at 524 n.*. Similarly, Justice Harlan filed a single opinion that dissented from *Ferguson*, *Rogers* and one other case, and concurred in the fourth case. *Id.* at 559 n.*.

(capitalization omitted). The railroad should be held liable, he argued, even if "some other factor may logically be said to be more influential in producing the injury." *Id.* at 27.

Substituting "slightest" cause as the standard for legal cause under FELA in place of the *Davis* proximate cause rule would cause a dramatic and unwarranted expansion of railroad liability. Tort law has always differentiated legal cause from cause-in-fact, see *Restatement (Second) of Torts* § 435 (1965), but a "slightest cause" standard is not materially different from a but-for causation standard. Absent a requirement that the railroad's negligence be a proximate cause of the employee's injury, FELA becomes less a tort statute than a worker's compensation statute for any wrongful act, without the limitations on recovery that most statutes apply. See *Carter*, 338 U.S. at 437-38 (Frankfurter, J.). The ramifications of reducing legal cause to the "'featherweight'" slightest-cause standard, *Johnson* v. *Offshore Express Inc.*, 845 F.2d 1347, 1352 (5th Cir. 1988), are particularly grave in the situation presented here of violations of the SAA (or the BIA). Under those statutes, the railroad's duties are absolute and the contributory negligence of the employee cannot be considered to reduce damages. See 45 U.S.C. § 53; *Rogers*, 352 U.S. at 507 n.13. Congress intended absolute liability for injuries that are the "'natural and probable consequence[s]'" of the statutory violation, *Brady*, 320 U.S. at 483, but not for all injuries with only the slightest causal connection to a violation, including ones in which the violation "merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury," *Davis*, 263 U.S. at 243.

This case illustrates the senselessness of the Sixth Circuit rule. It is commonplace for railroad workers to walk on the tracks alongside trains for all manner of reasons during train operations. If the worker falls and hurts himself, the railroad would generally be liable only if it negligently maintained the right of way, and, if so, its damages would be reduced by any

contributory negligence of the employee. It would be absurd to think Congress would impose absolute liability, without regard to contributory negligence, simply because the reason the employee got off the train to walk along the tracks was to inspect a malfunctioning brake.

Thus, under *Davis*, a FELA claim cannot go to the jury if the railroad's wrongful act "is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Id.* *Rogers* simply adds that, if the evidence would permit a jury to choose among multiple possible legal causes of the injury (such as the employee's and the railroad's negligence), the claim against the railroad must be allowed to go to the jury even if the railroad's negligence played the "slightest" part in the injury; such negligence need not be shown to be "the sole, efficient, producing cause of injury." 352 U.S. at 506. The Sixth Circuit not only lacked authority to say that *Rogers* superseded the rule of *Davis*, but it was wrong on that score. This Court should grant review to preserve its exclusive prerogative of determining the validity of its precedents, and should restore the rule of *Davis* in the Sixth Circuit.

II. THE DECISION BELOW WIDENS VARIOUS CONFLICTS OVER THE MEANING OF *ROGERS* AND THE CAUSATION RULE APPLICABLE UNDER FELA.

Review is further warranted because the decision below widens a conflict among the lower courts—both federal circuit courts and state supreme courts—over the standard of causation applicable under FELA.

As a threshold matter, various courts have held that *Rogers* did not speak to the continuing validity of proximate causation under FELA, but instead dealt with multiple causation and the test of a jury case. Consistent with the discussion in Section I of this Petition, those courts have

properly read *Rogers* as simply eliminating old and outmoded common-law conceptions of proximate cause that required the railroad's negligence to be the complete or dominant cause of injury. *Strobel* v. *Chicago, Rock Island & Pac. R.R.*, 96 N.W.2d 195, 199-200 (Minn. 1959) (holding that *Rogers* rejects "[t]he definition of proximate cause as the 'dominant' or 'predominant' cause"); *Marazzato* v. *Burlington N. R.R.*, 817 P.2d 672, 674 (Mont. 1991) ("the *Rogers* case was addressing the issues of multiple causes and contributory negligence after it had been established that the employer was negligent"). Those authorities are in conflict with the decision below, which interpreted *Rogers* as modifying the standard of causation under FELA.

Furthermore, there is a deep conflict among numerous courts over FELA's standard of causation. On the one hand, various courts have held or directly stated that a plaintiff attempting to prove liability under FELA must demonstrate that his employer's conduct was a proximate cause of his injury. These courts constitute a second conflict with the decision below (and with other decisions like it, see *infra* at 22-23).

In *Reed* v. *Pennsylvania Railroad*, the Ohio Supreme Court squarely held that a plaintiff must show proximate cause to prevail under FELA. 171 N.E.2d 718, 721-22 & n.3 (Ohio 1961). As in this case, the plaintiff was injured after the train stopped because of brake problems. Plaintiff sued,[6] and a directed verdict was entered against him, which was ultimately affirmed by the Ohio Supreme Court.

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[6] Reed's theory of liability was remarkably similar to Richards's claim in this case:

> * * * had the brakes not been defective, plaintiff would not have been required to descend from the cab and consequently injured; had the radiotelephone functioned properly, similar reasoning shows that likewise, plaintiff would have been saved from injury.

171 N.E.2d at 721.

The Ohio Supreme Court rejected plaintiff's claim because he was unable to demonstrate proximate cause. *Id.* at 721. Citing both *Carter* v. *Atlanta & St. Andrews Bay Ry.* and *Davis* v. *Wolfe*, the Court held that liability under the SAA requires a showing of proximate cause: "In order to support recovery for an injury claimed to have been caused by a violation of the Federal Safety Appliance Act, such violation must amount to *a* proximate cause of such injury although it need not be *the* proximate cause thereof." *Id.* at 721 n.3; see *id.* at 721 ("such violation could not legally amount to a proximate cause of the injury"). That court obviously did not view *Rogers* as having undermined this standard, for it elsewhere cited *Rogers*, but did not do so in this context. *Id.* at 720 n.1.

This decision stands in direct conflict with the decision below. The resulting conflict between the state and federal courts with jurisdiction over Ohio creates a particularly compelling argument for review by this Court.

In *Chapman* v. *Union Pacific Railroad*, 467 N.W.2d 388, 395 (Neb. 1991), the Nebraska Supreme Court likewise held that FELA requires a showing of proximate cause: "To recover under the Federal Employers' Liability Act, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury." See also *id.* ("'To prevail in an action based on negligence, a plaintiff must prove ... proximate causation ...."); *id.* at 396 ("a Federal Employer's Liability Act plaintiff must prove proximate cause" (citing *Chesapeake & Ohio Ry.* v. *Carnahan*, 241 U.S. 241 (1916)).

And in *Marazzato*, the Montana Supreme Court expressly rejected the argument that *Rogers* lowered a plaintiff's burden of proof. 817 P.2d at 674-75. Rather, it concluded, *Rogers*' purpose was to establish standards that govern multiple causation and contributory negligence. *Id.* at 674. In so reasoning, the court squarely held that proximate cause remains the rule under FELA: "The plaintiff has the burden

of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's" injury. *Id.* at 675. Other federal circuit courts and state supreme courts have likewise recognized the rule of proximate cause even after *Rogers*. See *Reed* v. *Philadelphia, Bethlehem & New England R.R.*, 939 F.2d 128, 130 (3d Cir. 1991) (a violation of the SAA is "'in itself an actionable wrong, in no way dependent upon negligence *and for the proximate results of which there is liability*'" (emphasis added) (quoting *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949))); *Gardner* v. *CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) ("'to entitle plaintiff to recover the proof must justify with reason that the injury complained of resulted, in whole or in part, from negligence of defendant which contributed proximately to the cause of the injury'"); *Lyles* v. *Alabama State Docks Terminal Ry.*, 730 So. 2d 123, 125 (Ala. 1998) (citing *Davis* as setting forth the causation standard under FELA); *Orchelle* v. *CSX Transp., Inc.*, 574 So. 2d 749, 752 (Ala. 1990) ("a railroad employee should be allowed to recover 'if the failure to comply with the requirements of the [SAA] is a proximate cause of the accident'" (alteration in original) (quoting *Davis*, 263 U.S. at 243));[7] *Snipes* v. *Chicago, Cent. & Pac. R.R.*, 484 N.W.2d 162, 164 (Iowa 1992) ("[r]ecovery under the FELA requires an injured employee to prove ... that the [employer's] negligence *proximately caused*, in whole or in part, the accident" (emphasis added)).[8]

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[7] The Alabama Supreme Court, in an earlier FELA case not involving the SAA, had interpreted the *Rogers* "slightest part" standard as "'either departing from, or eliminating in toto, the common-law concept of proximate cause.'" *Seaboard Coast Line R.R.* v. *Moore*, 479 So. 2d 1131, 1137 (Ala. 1985) (per curiam). It is not clear whether Alabama suffers from internal conflict, or purports to apply a different causation standard to SAA than to negligence claims.

[8] These are only the cases post-*Rogers* that continue to recognize a proximate cause standard. In other States, there exist pre-*Rogers* cases that remain good law in their jurisdictions, and that likewise require a

In marked contrast to these cases, the Sixth Circuit has now joined arms with other courts that permit FELA liability to arise on a showing of extraordinarily tangential "'featherweight'" causation. *Johnson*, 845 F.2d at 1352; *accord Page* v. *St. Louis S.W. Ry.*, 312 F.2d 84, 89 (5th Cir. 1963) (*Rogers* constituted a "departure from traditional common-law tests of proximate causation"; accordingly, a jury instruction regarding proximate cause was error); *Armstrong* v. *Kansas City S. Ry.*, 752 F.2d 1110, 1114 (5th Cir. 1985) (contrasting the *Rogers* standard with proximate cause). In addition to the Fifth and Sixth Circuits, courts that interpret *Rogers* to have overturned *sub silentio* this Court's precedents concerning proximate causation include the Second, Eighth, Ninth and Tenth Circuits. See *Nicholson* v. *Erie R.R.*, 253 F.2d 939, 940 (2d Cir. 1958) ("to impose liability on the defendant, the negligence need *not* be the proximate cause of the injury" (emphasis added)); *Ulfik* v. *Metro-N. Commuter R.R.*, 77 F.3d 54, 58 (2d Cir. 1996); *Fletcher* v. *Union Pac. R.R.*, 621 F.2d 902, 909 (8th Cir. 1980) ("The test of causation under the FELA is whether the railroad's negligence played any part, however small, in the injury ...."); *Claar* v. *Burlington N. R.R.*, 29 F.3d 499, 503-04 (9th Cir. 1994) (FELA requires proof of only a "small quantum of causation"); *Oglesby* v. *Southern Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993) ("'proximate cause' is not required under the FELA"); *Summers* v. *Missouri Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997) (holding that *Rogers* "definitively abandoned" proximate causation); *McCalley* v. *Seaboard Coast Line R.R.*, 265 So. 2d 11, 15 (Fla. 1972) ("the concept of proximate cause no longer has

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showing of proximate cause. *E.g.*, *Crozier* v. *Charleston & W.C. Ry.*, 71 S.E.2d 800, 802, 804, 806 (S.C. 1952); *Johnson* v. *Chicago Great W. Ry.*, 64 N.W.2d 372, 375-77 & nn.1, 5-6 (Minn. 1954); *Strobel*, 96 N.W.2d at 200.

any place in an action under the Federal Safety Appliance Act").[9]

In short, there is a square, deep conflict among the federal circuit courts and state supreme courts concerning the standard of causation under FELA.

The conflicts set forth above are ample reason for this Court to grant review. Yet even these divisions do not fully capture the state of the law in the lower courts. More than just a binary conflict between jurisdictions that require a showing of proximate cause and those that do not, the lower courts are in a state of chaos. There are conflicts within decisions of the same court. Compare, *e.g.*, *Houston Lighting & Power Co.* v. *Atchison, Topeka & Santa Fe Ry.*, 890 S.W.2d 455, 457 (Tex. 1994) (proximate cause), with *Maritime Overseas Corp.* v. *Ellis*, 971 S.W.2d 402, 406 (Tex. 1998) (Jones Act case holding that *Rogers* rejects proximate causation and establishes a "'featherweight'" slight-cause standard, but not addressing *Houston Lighting*); see also *supra* notes 3 and 7. Perhaps more importantly, there are a number of conflicts between the highest state court and the federal circuit court with jurisdiction over that State. In addition to the conflict within Ohio noted above, see *supra* at

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[9] Many of these courts, which take a broad reading of *Rogers* without close analysis of that case, rely on statements in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994) that FELA employs a "relaxed standard" of causation, *id.* at 543, and in *Crane* v. *Cedar Rapids & Iowa City Railway*, 395 U.S. 164 (1969), that a FELA plaintiff "is not required to prove common-law proximate causation," *id.* at 166. Those statements are true insofar as they mean that *Rogers* rejected the older common law conception of "proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Rogers*, 352 U.S. at 506. Indeed, *Davis* itself was regarded as a "liberal" interpretation of the "resulting in whole or in part" language of FELA. *Brady*, 303 U.S. at 15. In any event, such dicta cannot support the overruling of the many cases of this Court holding that proximate cause is the longstanding rule under FELA. This Court should act to clear up any confusion.

21, there are federal-state conflicts in Iowa, compare *Snipes*, 484 N.W.2d at 164, with *Fletcher*, 621 F.2d at 909; Montana, compare *Marazzato*, 817 P.2d at 675, with *Claar*, 29 F.3d at 503-04; and Nebraska, compare *Chapman*, 467 N.W.2d at 395, with *Fletcher*, 621 F.2d at 909. Furthermore, still other courts interpret *Rogers*—as did Justice Harlan at the time, see *Ferguson*, 352 U.S. at 563-64 (Harlan, J., dissenting)—as speaking to the evidentiary burden on FELA plaintiffs, rather than the substantive standard of causation under FELA. *E.g.*, *Seeberger* v. *Burlington N. R.R.*, 982 P.2d 1149, 1152 (Wash. 1999).

All of this disarray stems from a patent misinterpretation of *Rogers*. This Court should act now to bring clarity and closure to this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 14, 2003

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 01-4130

HONAS H. RICHARDS,
Plaintiff Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee.

Filed: May 28, 2003

Before MARTIN, Chief Circuit Judge; ROGERS, Circuit Judge; EDMUNDS, District Judge.*

OPINION

EDMUNDS, District Judge.

This appeal arises from the district court's grant of summary judgment for defendant-appellee Consolidated Rail Corporation ("Conrail") in this action filed under the Federal Safety Appliances Act ("FSAA"), 49 U.S.C. §§ 20301-20306, the Federal Employee Liability Act ("FELA"), 45 U.S.C. §§ 51-60, and the Federal Boiler Inspection Act ('BIA'), 49 U.S.C. §§ 20701-20703. Plaintiff Appellant Honas Richards ("Richards") challenges the district court's

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* The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

dismissal of his FSAA claim,[1] arguing that the court erred in finding that he failed to produce sufficient evidence of a defective appliance and that this defect caused his injuries. Because we find that Richards produced sufficient evidence to survive summary judgment on the issue of the defect and because we find that this court's holding as to causation in *Reetz v. Chicago & Erie Railroad Co.*, 46 F.2d 50 (6th Cir.1931) has been called into question by the United States Supreme Court's holding in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), and never clarified, we reverse and remand.

Richards began working for Conrail in 1953. He became a conductor in 1957 and was working in that position on May 1, 1999. On that date, Richards and a co-worker were responsible for taking a freight train with approximately ninety cars from Columbus, Ohio, to Cincinnati, Ohio.

Approximately thirty minutes after leaving Columbus, the train unexpectedly stopped as a result of an automatic emergency application of the air braking system. In such a situation, the conductor must attempt to determine the cause of the undesired brake application. This is done by "walking the train"—i.e. getting off the train, walking its length, and inspecting for visible causes. After placing an emergency radio call to the dispatcher, Richards climbed down from the train and began his inspection.

Richards walked east alongside the train on the ballast, stopping occasionally to inspect underneath the cars. At some point, he lost his footing and allegedly injured his back. Richards waited until the pain in his back subsided and then he completed his inspection.

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[1] The district court summarily dismissed Richards' FELA and BIA claims as well; however, he does not appeal those portions of the court's decision.

Richards did not observe any defects during his inspection that would have caused an emergency brake application—for example, an air hose leak, car derailment, or "shift in loads." Based on his experience and training, Richards therefore concluded that the stop must have been caused by a defective control valve, commonly referred to as a "kicker." Each freight car equipped with a brake has an internal valve that controls the amount of air that is depleted to activate the brake system. Obviously if this valve is located inside the brake mechanism, Richards could not visibly inspect it when he walked the train. As Richards explained,

> My examination eliminated everything except a defective control valve. There had to be a reason, and there was no reason—normal reasons are like busted air hoses where the air escapes into the atmosphere. Train brakes apply when air is taken away from the system not when it's put in. When you put it in, the brakes release. When you take it away, the brakes apply.
>
> And so there had to be some—since there was [sic] no leaks and I walked that whole thing . . . So based on my experience and what I've been taught in these classes, the only reasonable explanation was a defective control valve, a kicker.

The district court granted Conrail's motion for summary judgment, finding as to Richard's FSAA claim that he failed to provide sufficient evidence to prove that the braking system was defective. After reviewing the evidence, specifically the transcript from Richard's deposition, the court concluded that Richards only could "opine[ ]" that the stop was caused by a defective control valve. The court also concluded that, even upon proof of a defective appliance, Richards could not demonstrate that his injury was causally linked to the allegedly defective appliance. Relying primarily upon this court's opinion in *Reetz*, the district court held that

the defective control valve did not cause Richard's injury; rather, his injury merely was an incidental condition of the defect. The trial court explained,

> Plaintiffs slip while walking the track was only incidentally caused by the alleged appliance violation; the injury was not the 'direct or efficient' cause of any alleged appliance violation. As in *Reetz*, although Plaintiff would not have been walking the track to inspect but for the allegedly defective appliance, his subsequent slip and injury bears too tenuous a connection with the defective appliance so as to give rise to liability.

I. Standard of Review

We review *de novo* a district court's order granting summary judgment, viewing all the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 775 (6th Cir.2001) (citations omitted). The moving party must show the absence of a genuine issue of material fact, and the nonmoving party must then come forward with specific facts showing that there is a genuine issue for trial. *Id.*

II. Analysis

The FSAA imposes an absolute duty on railroads to provide and maintain certain safety appliances, including power braking systems. *Myers v. Reading Co.*, 331 U.S. 477, 485, 67 S.Ct. 1334, 91 L.Ed. 1615 (1947); *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 390, 70 S.Ct. 200, 94 L.Ed. 187 (1949). To recover for a violation of the FSAA, therefore, plaintiffs need only show (1) the statute was violated; and (2) they suffered injuries "resulting in whole or in part" from the defective equipment. *Coray v. S. Pac. Co.*, 335 U.S. 520, 524, 69 S.Ct. 275, 93 L.Ed. 208 (1949).

A. Proof of a Defective Appliance

There are two recognized methods of showing that an appliance was defective: "'Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner.'" *Myers*, 331 U.S. at 483, 67 S.Ct. 1334 (quoting *Didinger* V. *Pennsylvania R.R. Co.*, 39 F.2d 798 (6th Cir.1930)). As the *Myers* Court elaborated, "Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate." *Id.* If the plaintiff demonstrates a defect using the second method, he or she need not show an actual break or visible defect. *Id.* If the plaintiff establishes that the appliance functioned inefficiently at the relevant time, it is irrelevant that the appliance worked efficiently both before and after the occasion. *Id.*

Thus in *Didinger*, where the plaintiff demonstrated that he firmly set a hand brake which immediately gave way and failed to hold, this court held that it was not necessary for the plaintiff to show the specific reason why the brake failed:

> Assuming the proper setting of the [hand] brake, the fact that it did not hold demonstrates its inefficiency. As said *in* [*Philadelphia & R.R. Ry. Co. v. Auchenbach*, 16 F.2d 550, 552 (3d Cir.1926)]: 'The test of the observance of this duty (under the Safety Appliance Act) is the performance of the appliances,' and it was not necessary for the plaintiff to show whether this failure to function was due to the fact that the ratchet broke loose from the brake staff, that the ratchet teeth were worn, that the dog or its rocker pivot broke, that there was too much vertical play between dog and ratchet . . . or any other precise defect [*Minneapolis & St. Louis R.R. Co. v. Gotschall*, 244 U.S. 66, 37 S.Ct. 598, 61 L.Ed. 995

> (1917)]. If the brake was properly set, as asserted, some defect must have been latent in it. Otherwise it would have held.

Didinger, 39 F.2d at 799. As *Didinger* suggests, plaintiffs may rely on the doctrine of *res ipsa loquitur* to prove their FSAA claims. *Id.; see also Myers*, 331 U.S. at 483-84, 67 S.Ct. 1334 (holding that conductor's testimony that brake wheel did not function like ordinary wheel and that it suddenly "kicked back" and knocked him to ground was sufficient to make an issue for the jury as to whether brake was defective); *Anderson v. Baltimore & O.R. Co.*, 89 F.2d 629, 630 (2d Cir.1937)(finding that "the failure of the [sanding] apparatus to function when operated in a proper manner and under normal working conditions makes a prima facie case of insufficiency either in the air pressure or in mechanical construction. The doctrine of res ipsa loquitur has frequently been applied to prove, in the absence of explanation, a violation of provisions of the Safety Appliance Act.") Trial judges should not rule out plaintiffs' opinions as to why appliances functioned inefficiently, where the plaintiffs' opinions are based on their experience and perceptions at the time of their accident. *See Fritts v. Toledo Terminal R.R. Co.*, 293 F.2d 361, 363-64 (6th Cir.1961)(holding that trial judge improperly ruled out plaintiff's opinion, based on his experience working for the railroad, that lurching of the engine was due to a worn frog); *see also Myers*, 331 U.S. at 483, 67 S.Ct.1334 (holding that the plaintiffs testimony as to the inefficiency of the appliance "is such substantial evidence of inefficiency as to make an issue for the jury").

Here, the district court held that Richards failed to present evidence of a particular defect with the train's air braking system. Richards testified, however, that based on his experience and training and his visual inspection of the train following the emergency stop, that the stop "must have been" caused by a defective control valve. Although Richards may

not have emphatically expressed his assessment of the cause of the stop at his deposition, a jury could conclude that he was stating more than a mere assumption, as the district court characterized his testimony.

B. Causation

Turning to the second and final element of a plaintiff's FSAA claim—that is, whether the alleged defect caused the plaintiffs injury—the Supreme Court announced a relaxed test for establishing causation in FELA cases in its landmark decision, *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).[2] The *Rogers* Court set forth the following test to determine whether there is a jury question on this issue:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met,

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[2] Although *Rogers* was a FELA case, its holding on causation applies to FSAA and BIA claims as well. *See Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949)(holding that the FSAA and BIA are substantially, if not in form, amendments to FELA; they dispense, for purposes of employees' suits, with necessity of proving that violations of the safety statutes constitute negligence; statutes should be read and applied together).

> are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence.

Rogers, 352 U.S. at 506-07, 77 S.Ct. 443. Under this standard, the role of the jury is significantly greater in FELA cases than in common law negligence actions. *Eggert v. Norfolk & W. Ry. Co.*, 538 F.2d 509, 511 (2d Cir.1976) (citations omitted). As this court has explained, *Rogers* requires a plaintiff alleging a FELA violation to offer "more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more." *Aparicio v. Norfolk & W. Ry. Co.*, 84 F.3d 803, 810 (6th Cir.1996).

The *Rogers* Court adopted this relaxed standard in order to effectuate Congress' intent when it amended FELA in 1939 "to preserve the plaintiff's right to a jury trial." *Green v. River Terminal Ry. Co., 763* F.2d 805, 806 (6th Cir.1985). As the Supreme Court explained,

> The Congress when adopting the law was particularly concerned that the issues whether there was employer fault and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence.

Rogers, 352 U.S. at 508, 77 S.Ct. 443. In other words, the *Rogers* Court found "that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ. . . ." *Id.* at 510, 77 S.Ct. 443.

Prior to *Rogers,* several courts analyzed the issue of causation by distinguishing situations where the defective appliance was "the cause of or the instrumentality through which the injury [was] directly brought about" from instances

where the defect merely was incidental in creating the condition in which the plaintiff was injured. *See, e.g., Reetz*, 46 F.2d at 52. *In Reetz*, a conductor was killed after the train on which he was riding went into an emergency stop due to defective couplers. It was dark at the time, and some of the train's cars stopped on a bridge. The conductor and the train's brakeman began to walk the train in order to identify the cause of the stop and repair any defect. As the conductor walked alongside the cars stopped on the bridge, he fell to his death. The brakeman was on the other side of the train and so he did not see what the conductor was doing when he fell. The trial court directed a verdict for the railroad, finding that the conductor's fall from the bridge was not directly caused by the defective appliance; instead, the defect merely created the condition whereby the conductor happened to be at the place where he was injured. *Id.* at 51-52. Upholding the district court's decision, this court stated:

> [A]t least in those cases where there has been a failure of a required appliance, there is liability only where the failure of the appliance not only creates a condition under which, or an incidental situation in which the employee is injured, but where the defective appliance is itself an efficient cause of or the instrumentality through which the injury is directly brought about.

Id. at 52.

As the district court relied on this incidental situation versus instrumentality distinction to decide the present matter, this court must determine whether *Reetz* still is applicable to decide causation in FSAA cases following *Rogers*. This court has addressed this issue since *Rogers* but not consistently. In some cases the court has applied *Reetz*, in other cases the court has held that *Reetz*' distinction no longer is appropriate. *See, e.g., Hausrath v. New York Cent. R.R. Co.*, 401 F.2d 634 (6th Cir.1968)(relying on *Rogers* and adopting a more relaxed standard of causation than *Reetz*); *Black v. Penn Cent.*

Co., 507 F.2d 269 (6th Cir. 1974)(acknowledging *Rogers*, but relying on *Reetz* to hold that the defective appliance was not a "contributory proximate cause" of the plaintiffs injuries);[3] *Green*, 763 F.2d at 810 (relying on *Reetz* to find that the defective appliance at best only created an incidental condition in which the plaintiff was injured). In none of the cases declining to apply *Reetz*' distinction, however, has the court overruled that decision. Courts in other jurisdictions, however, specifically have rejected *Reetz* in cases similar to the present matter. *See New York, New Haven & Hartford R. Co. v. Leary*, 204 F.2d 461 (1st Cir.1953); *Warning v. Thompson*, 249 S.W.2d 335 (Mo.1952).

Leary presented a factual scenario similar to *Reetz*: *a* conductor, walking alongside a train at night after it went into an emergency stop due to defective air brakes, fell from a bridge on which some of the train's cars had stopped. The trial court denied the railroad's motion for a directed verdict and, after a jury returned a verdict for the plaintiff, motion for judgment notwithstanding the verdict. *Leary*, 204 F.2d at 462. The First Circuit Court of Appeals upheld the lower court's decisions on the motions, concluding that there was sufficient evidence for a jury reasonably to find that the conductor's fall "was within the risk created by the defective air brake." *Id.* at 467. The *Leary* court rejected *Reetz*, finding this court's reasoning "unpersuasive." *Id.* at 466. The court explained:

> Defective brakes create a number of hazards, depending on the circumstances under which they operate. The

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[3] Judge McCree, dissenting on another issue in *Black*, agreed that there was no evidence that the defective appliance was a causal factor in the plaintiffs injury; however citing *Rogers*, Judge McCree noted that it was "unnecessary and erroneous" for the majority to focus on proximate cause. *Black*, 507 F.2d at 272 (McCree, J., dissenting). Judge McCree interpreted *Rogers* as making clear that "in adopting the language 'resulting in whole or in part,' the Congress intended to depart from the language of proximate causation . . ." *Id.*

> danger is not confined merely to the likelihood that a sudden stop or a failure to stop might produce a collision or a severe jolt. In the instant case the danger also consists in the fact that a sudden stop in the night exposed the employees to other hazards. Among these hazards are bad weather, faulty road bends, and an unperceived trestle.

Id. The court reasoned that once the train stopped, it became the conductor's duty to discover and repair whatever caused the stop, and he was injured in his performance of this responsibility. *Id.* at 467. The court concluded that "'Foreseeability does not mean that the precise hazard or the exact consequences which were encountered should have been foreseen.'" *Id.* (quoting James and Perry, *Legal Cause,* 60 Yale L.J. 761, 797 (1951)).

In *Warning*, a railroad engineer was injured while climbing up the front of a locomotive in order to reach and repair part of a defective sanding apparatus. *Warning*, 249 S.W.2d at 337. There was evidence that this was the customary and required method for reaching and fixing the defective part. *Id.* The pilot on the locomotive, however, was wet and the engineer slipped and fell. *Id.* After the jury returned a verdict in favor of the plaintiff, the defendant appealed, arguing in part that the defective appliance was not the proximate cause of the engineer's injuries and that the trial court's instruction on causation was improper. *Id.* at 340.

The trial court in *Warning* had submitted causation to the jury by requiring these findings:

> the failure of the sanders to function "was the cause of plaintiff being where he was when he fell; . . . he fell while getting onto or trying to get onto" the pilot; "he was going up to get to the sand traps to do work to get sand to go out of the sand traps and onto the rails by use of the air valve in the cab"; the failure of the sanding

> apparatus to function and his going up to get to the traps to get the sand to flow subjected him to a peril that would have been unnecessary if, when he used the air valve in the cab, the traps would have functioned.

Id. at 340-41. On appeal, the Missouri Supreme Court held that there was a "direct causal connection between the failure of the sanders to function and plaintiffs injuries, and that the instruction was a proper submission of that issue." *Id.* at 341.

The *Warning* court acknowledged the factual similarity between the case before it and *Reetz* but concluded that the connection between the defective appliance and the plaintiff's injury was not as one-sided as the *Reetz* court concluded. *Id.* Quoting from the Second Circuit Court of Appeals' decision in *Anderson*, a case which also involved a similar factual scenario,[4] the *Warning* court explained:

> Whether in a given case the statutory violation is to be deemed the proximate cause, or merely a condition, of the accident is often a troublesome problem, and it is impossible to harmonize all of the many decisions on the subject. The defendant argues that [the plaintiff's] own act in placing himself in a position of danger where he would be struck by the Erie engine was the proximate cause of his death, and the defect in the sanders only a remote cause or condition of the accident. *But* the jury might reasonably find from the evidence that he had taken this position in an effort to remedy the defect and get the sand to flow . . . and that this conduct was a normal reaction to the stimulus of a situation created by the defendant's violation of its statutory duty.

Id. (quoting *Anderson*, 89 F.2d at 630)(emphasis added). In other words, the *Warning* court concluded, a jury could find

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[4] In *Anderson*, a fireman was struck and killed by a passing engine while bending over to examine the pipes of the train's sanding apparatus which had failed to deliver sand to the rails. *Anderson*, 89 F.2d at 630.

that the "[p]laintiff s presence at the place where he fell was no 'mere occasion,'" as 'his duties required him to be at that place, and his injury was the direct result of the failure of the sanders to function." *Id.* Because the evidence could be interpreted in more than one way, the court concluded that the issue of causation should be decided by the jury.

At least one other court has applied the same rationale to conclude that the issue of causation should have been submitted to the jury in a case factually similar to the one before this court. *See Hendrick v. CSX Transp., Inc.*, 575 So.2d 709 (Fla.Dist.Ct.App.1991). In *Hendrick*, a brakeman was riding on a train that went into an emergency stop after two coupling mechanisms, or "knuckles," broke. *Hendrick*, 575 So.2d at 710. The brakeman was responsible for replacing the broken knuckles. While carrying a new knuckle up the ballasted slope beside the track, the brakeman lost his footing, slipped, and injured his back.

The trial court directed a verdict for the railroad, holding that the broken knuckles merely created the situation to which the brakeman was responding when he was injured. *Id.* at 711. The appellate court reversed, holding that "the trial court erred in focusing on concepts of proximate cause and whether the railroad's negligence merely created a condition or situation to which the employer [sic] was required to respond." *Id.* at 712. The court reasoned that the jury could have found that but for the defective equipment, the brakeman never would have been required to replace the knuckle and been injured. *Id.*

As the *Warning* court noted, determining in a given case whether an alleged defect is the proximate cause or merely a condition of the plaintiffs injury is often a troublesome matter; as a result, courts often reach different conclusions on the issue of causation when faced with factually similar scenarios. Here, applying *Reetz*, the district court concluded that Richards' losing his footing on the ballast was only

incidental to the defect which he was attempting to identify. As other courts have recognized, however, a jury might reasonably have concluded that Richards only was injured because the braking system failed to function properly, it was his duty to identify and remedy the defect, and the proper method for fulfilling his responsibilities was walking the train. *Rogers* makes clear that where the evidence allows more than one outcome on the issue of causation, the issue should be decided by a jury, not a judge. *Rogers*, 352 U.S. at 506-07, 77 S.Ct. 443.

We now join those courts that have rejected *Reetz* in light of *Rogers* and hold that *Reetz* no longer is good law. Courts in FSAA cases (and FELA and BIA cases as well) should focus on whether a reasonable jury could conclude that the defective appliance played *any* part, even the slightest, in bringing about the plaintiff's injury. This means that if a reasonable jury could find that the plaintiff's injury "was within the risk created by" the defective appliance, the plaintiffs right to a jury trial should be preserved. For example, if as a result of a defective appliance a plaintiff is required to take certain actions and he or she is injured while taking those actions, the issue of causation generally should be submitted to a jury.[5]

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[5] Admittedly scenarios will arise where the connection between the defective appliance and the plaintiffs injuries become too attenuated to conclude that the defect caused the injury. Take for example the following scenario: a train goes into an emergency stop due to defective air brakes; and an employee, who has exited the train and is standing next to it merely waiting for the brakes to be repaired, is attacked by a rabid dog. Or the same employee waiting for the defect to be repaired decides to stretch his or her legs, goes for a walk, falls, and is injured. A court reasonably could find no causation as a matter of law in these situations.

III. Conclusion

As the evidence indicates that air brakes only go into an emergency stop due to an actual emergency (which was not present here), application by someone on the train (also absent), or some defect, we find that the trial court erred in holding Richards' testimony insufficient to demonstrate a question of material fact on the issue of whether the appliance was defective. We find that the district court erred in failing to submit the issue of causation to a jury as well. The district court relied on *Reetz* in analyzing the issue of causation; however that case is no longer good law in light of *Rogers*. For these reasons, we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT, S.D. OHIO
EASTERN DIVISION

No. 2:00-CV-321

HONAS H. RICHARDS,
Plaintiff,

v.

CONSOLIDATED RAIL CORP.,
Defendant.

Sept. 10, 2001

OPINION AND ORDER

SARGUS, District J.

This matter is before the Court on the Defendant's Motion for Summary Judgment. (Doe. # 21). For the reasons that follow, the motion is granted.

I.

Plaintiff, Honas Richards, brings this action against Defendant Consolidated Rail Corp., alleging violations of the Federal Employers' Liability Act ["FELA"], 45 U.S.C. § 51, *et seq.*, the Locomotive Boilers Inspection Act ["LBIA"], 49 U.S.C. § 20701, *et seq.*, and the Federal Safety Appliance Act ["FSAA"], 49 U.S.C. § 2301, *et seq.*, in connection with an incident that occurred while he worked as a conductor for Consolidated Rail. This action was originally filed in the United States District Court for the Eastern District of Pennsylvania and was transferred to this Court by stipulation of the parties. The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

Plaintiff commenced employment with Consolidated Rail 1953; he has worked as a conductor since 1957. On May 1, 1999, Plaintiff was traveling on a freight train, which consisted of approximately ninety cars, from Columbus, Ohio to Cincinnati, Ohio. (*Deposition of Honas Richards*, hereinafter referred to as "*Richards Depo.*" at 10-11; 20). Approximately thirty minutes after leaving the Buckeye Yard in Columbus, the train went into an "emergency" status and came to a complete stop. (*Id.* at 12). According to Richards, the train was traveling at an approximate speed of twenty-five miles an hour. (*Id.* at 13). When the train came to a stop, Plaintiff placed an emergency radio call and exited the train in an attempt to determine the cause of the stop.[1] (*Id.* at 14).

Plaintiff walked along the east side of the track to inspect the train and determine why it had stopped. (*Id.* at 18). Plaintiff walked four or five feet away from the train along the mainline track bed. (*Id.* at 17). As he walked, Plaintiff slipped on ballast on the track bed. Plaintiff did not fall down, however, as he was able to catch himself. Plaintiff describes the incident in the following manner:

> [A]ll at once, as I recall, I planted my right foot and was about to make a step with my left foot and all at once there was nothing under my right foot. And since I was on a severe slope from left to right, high on the left and low on the right, and the weight had been on my right foot and now there's nothing underneath my foot, I had the sensation I was going to fall on top of my head. Just roll over on top of my head. So I just rolled around to square my feet up on that bank.

(*Richards Depo.* at 18). According to Richards, the track bed consisted partly of ballast and partly of dirt. (*Id.*). Upon further questioning, Plaintiff testified that, as he discovered

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[1] In Richards' opinion, the stop was caused by "a defective control valve." (*Id.* at 13).

there was nothing under his right foot, "it was like a lightening bolt went off in the small of my back. . . it felt like I was going to fall on my head. So I whirled, and when I whirled, my back, the lower it hurt so bad that everything felt liquid (sic)." (*Id.* at 19). On deposition, Plaintiff could not recall how it took for the pain to subside. Once his pain subsided, Plaintiff resumed his inspection of the train.

Plaintiff was unable to provide any further details about the incident. He testified that there were no weeds or trees in the area that may have caused him to slip and the area was not wet, or slippery. (*Id.* at 22-23). Plaintiff testified that there were wooden ties "scattered" along the track, but he was able to step around and avoid them. (*Id.* at 23). Plaintiff stated, "[t]here wasn't anything showing above the ground that I stepped on . . . ." (*Id.*). Plaintiff summarized the incident in the following manner: "Now, what happened when everything went to blazes, I don't know because I was only concerned with self-preservation. I will be real truthful." (*Id.*).

In an affidavit attached to his *Memorandum contra* Defendant's Motion for Summary Judgment, Plaintiff avers that his slip was caused as a result of the "road ballast [having] shifted or collapsed." (*Affidavit of Honas Richards* at ¶ 21). Plaintiff further avers that "[h]ad I been walking on yard ballast, my accident would not have happened." (*Id.*). According to Plaintiff, yard ballast is composed of small, tightly packed stones and is intended to be used in areas for walking. (*Id.* at ¶ 13). In contrast, road ballast is composed of larger rocks which shift and collapse more frequently since they are not tightly packed. (*Id.* at ¶ 14). Plaintiff contends in his affidavit that there is no reason, other than cost-effectiveness, for the use of road ballast on the main track. (*Id.* at ¶ 15).

Defendant Consolidated Rail moves for summary judgment on the basis that Plaintiff fails to present evidence on

the essential elements of a claim under FELA, the LBIA, and the FSAA.

II.

The procedure for considering whether summary judgment is appropriate is set forth in Fed.R.Civ.P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 158-159 (1970). Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); see also *Matsushita Electronics Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby, Celotex*, and *Matsushita* have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir.1989). The court in *Street* identifies a number of important principles in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Street* at 1479.

In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.* (quoting *Matsushita*, 475 U.S. at 586). Moreover, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely on to create a genuine issue of material fact.

III.

A. Plaintiff's FELA Claim

FELA provides a federal cause of action for the employee of a railroad who is injured or killed as a result of the railroad's negligence. 45 U.S.C. § 51.[2] The statute has been "'liberally construed . . . to further Congress' remedial goal' of holding railroads responsible for the physical dangers to which their employees are exposed." *Fonseca v. Consolidated Rail Corp.*, 246 F.3d 585, 588 (6th Cir.2001), quoting *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). Despite the liberal construction, however, FELA is not interpreted as a workers' compensation statute, *i.e.*, compensation is not payable for injuries that occur in the

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[2] The statute provides:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51.

absence of the employer's negligence. *Id.* Rather, FELA has been construed so as to require that railroads provide their employees with a reasonably safe workplace. *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir.1990).

In order to state a cause of action under FELA, the Plaintiff must establish (1) that he was injured, (2) that the railroad was negligent, and (3) that the railroad's negligence caused, in whole, or in part, plaintiffs alleged injuries. 45 U.S.C. § 51. Thus, in order to prevail on a FELA claim, the Plaintiff must prove the common-law elements of negligence, *i.e.*, duty, breach, foreseeability, causation, and damages. *Adams v. CSX Transp. Co.*, 899 F.2d 536 (6th Cir.1990).

A railway employer breaches its duty to the employee "if [the employer] knew or should have known of a potential hazard in the workplace, and yet failed to exercise reasonable care to inform and protect its employees." *Peyton v. St. Louis Southwestern Ry.*, 962 F.2d 832, 833 (8th Cir.1992). To establish reasonable foreseeability in FELA cases, the Plaintiff must offer proof that the Defendant had actual or constructive knowledge of the defect that caused the injury. *See Barger v. CSX Transportation, Inc.*, 110 F.Supp.2d 648 (S.D.Ohio 2000); *Gallose v. Long Island R.R. Co.*, 878 F.2d 80, 85 (2nd Cir.1989). With respect to causation, the test is whether an employer's actions played any part at all in causing the injury. *Handyman v. Norfolk & Western Railway Co.*, 243 F.3d 255, 259 (6th Cir.2001). Despite this relaxed causation standard, however, if the Plaintiff presents no evidence whatsoever to support an inference of negligence, summary judgment is appropriate. *Lisek v. Norfolk & Western Ry. Co.*, 30 F.3d 823, 832 (7th Cir.1994).

The Defendant in this case moves for summary judgment on the basis that Plaintiff fails to provide any evidence of action or inaction on its part to cause the Plaintiffs injury. As the Defendant points out, its duty is defined by whether it had actual or constructive knowledge of the allegedly unsafe

workplace condition. "[A]n employer is not liable if it has no reasonable way of knowing that a potential hazard exists." *Williams v. National Railroad Passenger Corp.*, 161 F.3d 1059, 1062 (7th Cir.1998). The Plaintiff argues that the presence of large ballast along the track constituted an unsafe work condition because it provided Plaintiff with "poor footing." (*Memorandum contra* at 12). According to Plaintiff, a jury "[could] conclude that the railroad was negligent in not using small ballast throughout its entire [track] system." (*Id.* at 12-13).

Plaintiff's argument is without merit. This Court concludes that Plaintiff may not rely upon the allegations offered in his affidavit to create a genuine issue of material fact. On deposition, Plaintiff was unable to articulate any basis for the cause of his slip as he walked the track on May 1, 1999. In particular, Plaintiff testified: "Now, what happened when everything went to blazes, I don't know because I was only concerned with self-preservation. I will be real truthful." (*Plaintiff's Depo.* at 23). In a later filed affidavit, however, Plaintiff attributed the slip to the "road ballast [having] shifted or collapsed." (*Plaintiff's Affidavit* at ¶ 21 attached to *Memorandum contra*). It is well-settled in this circuit that a party may not defeat summary judgment by filing an affidavit which contradicts earlier testimony given by way of deposition. *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir.1986).

This case is analogous to the situation presented in *Smith v. Consolidated Rail Corp.*, No. 95-3727,1996 WL 366283 (6th Cir. June 28, 1996). As the Plaintiff herein, the Plaintiff in that case testified on deposition that he did not know what caused him to fall down an embankment as he walked alongside the train following a collision. In a later filed affidavit, the Plaintiff attributed the fall to one of three things—the presence of vegetation, debris or loose ballast. *Id.* at *1. The Sixth Circuit affirmed the decision to grant summary

judgment to the railroad on Plaintiff's FELA claim, concluding that if the Plaintiff "had hypotheses about the cause of his fall, he was required to say so at his deposition when he was specifically questioned on the subject." *Id.* at *4.

This Court similarly concludes that the statements given by Plaintiff in his affidavit cannot create a genuine issue of material fact in this case. First, the statement in the affidavit was given following the deposition. A Plaintiff does not create a genuine issue of material fact through an affidavit if such affidavit contradicts his or her previous deposition testimony, which would otherwise entitle the Defendant to summary judgment. *Reid, supra.* Second, even if the subsequent affidavit is considered, the Plaintiff has not identified any actual or constructive knowledge on the part of the Defendant that the particular section of the track on which Plaintiff was injured was unsafe. Thus, the Defendant is entitled to summary judgment on Plaintiffs FELA claim.[3]

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[3] In its *Reply Memorandum*, the Defendant urges this Court to conclude that Plaintiff is precluded as a matter of law from pursuing a FELA claim based upon the arguably unsafe condition of large ballast found along the mainline track. According to the Defendant, the presence of large ballast comports with the regulations promulgated pursuant to the Federal Railroad Safety Act, 49 U.S.C. § 20101, *et seq.*; specifically, 48 C.F.R. § 213.103, which states that ballast is used to:

> (a) Transmit and distribute the load of the track and railroad equipment to the subgrade;
>
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
>
> (c) Provide adequate drainage for the track; and
>
> (d) Maintain proper track cross-level, surface and alignment.

The Court notes that, in the context of regulations regarding train speed, some courts have held that FELA claims are precluded when the railroad was in compliance with the FRSA speed regulations. *See Waymire v. Norfolk and Western Railway Co.*, 218 F.3d 773 (7th Cir.2000). At least

B. Plaintiffs Claimed Violations of the LBIA and FSAA

The Defendant also seeks summary judgment to the extent that Plaintiff's FELA claim is premised upon violations of the LBIA and FSAA.

The FSAA requires that railroad carriers equip locomotives with certain safety devices, including brakes, as specified in the statute or in the regulations promulgated thereunder. *See* 49 U.S.C. § 20302. The LBIA prohibits carriers from using locomotives unless "the locomotive or tender and its parts and appurtenances . . . are in proper condition and safe to operate without unnecessary danger of personal injury. . . ." 49 U.S.C. § 20701. These Acts do not, by themselves, confer any right of action on injured employees. Rather, the Acts supplement FELA by "imposing on interstate railroads an absolute and continuing duty to provide safe equipment." *Urie v. Thompson*, 337 U.S. 163, 188 (1949)(internal quotation omitted). A violation of one of the Acts provides "dispense[s], for the purposes of employees' suits, with the necessity of proving that violations of the safety statutes constitute negligence; and making proof of such violations is effective to show negligence as a matter of law." *Id.* at 189. In such a case, the Plaintiff need only prove that his injury resulted in whole or in part from the railroad's violation of the Act. *Crane v. Cedar Rapids & Iowa City Railway Co.*, 395 U.S. 164, 166 (1969).

In this case, the Plaintiff contends that the braking system on the train was defective, causing it to "emergency stop." Plaintiff contends that, but for the defective brakes, he would not have had to walk the track to inspect the train on May 1,

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one court, however, has declined to adopt such analysis in the context of a FELA claim premised upon the safety of ballast. *See Grimes v. Norfolk Southern Railway Co.*, 116 F.Supp.2d 995 (N.D.Ind.2000). This Court expresses no view on the issue in light of its conclusion with respect to Plaintiffs affidavit.

1999 and would not have slipped and injured his back. The Defendant argues that summary judgment is appropriate because Plaintiffs injury is too tenuously related to any alleged deficiency in the braking system.

While it is clear that a railroad may be liable under FELA for injury caused "in whole or in part" from a violation of the FSAA or LBIA, the Court concludes that Plaintiff in this case has failed to come forward with sufficient evidence to establish a genuine issue of material fact that a violation of one of the Acts occurred. Plaintiff simply opined, on deposition, that "[i]t must have been . . . a defective control valve as a kicker." (*Plaintiff's Depo.* at 26). Plaintiff explained that the control valve controls the amount of air that is taken away from the air brake system. (*Id.* at 92). Plaintiff further testified that, based upon his inspection, because he was unable to find any reason for air to escape, he concluded that "a defective control valve or kicker was the only reasonable explanation why the train went into emergency." (*Id.*).

In *Grogg v. Missouri Pacific Railroad Co.*, 841 F.2d 210 (8th Cir.1988), a railroad employee sought recovery under FELA for injuries sustained after the train went into an emergency stop because an air brake hose had separated from one of the cars on the train. The district court had directed a verdict against the Plaintiff because she failed to show a defect in the air braking system so as to amount to a violation of the FSAA. The Eighth Circuit reversed this finding, holding that Plaintiff did not need to show a defect in order to establish a violation of the Act; rather, she had to offer proof that the equipment failed to work properly. *Id.* at 212, citing *Myers v. Reading Co.*, 331 U.S. 477 (1947).

The Plaintiff in *Grogg* was able to offer some evidence that the hose in fact caused the train in that case to go into an emergency stop. In this case, however, Plaintiff comes forward with no proof that it was in fact the control valve that

caused the train to come to an emergency stop on May 1, 1999. Rather, Plaintiff simply opines that it must have been a "defective control valve." When faced with a summary judgment motion, the Plaintiff has the burden to come forward with evidence to support the existence of a genuine issue of material fact. In the absence of some evidence to bolster Plaintiffs assumption that it "must have been" the control valve which caused the train to emergency stop, the Court concludes that no genuine issue of material fact exists to the extent that Plaintiff's FELA claim is premised upon violation of the FSAA or LBIA.

Further, even assuming a violation of the FSAA or LBIA, the Court concludes that Plaintiff has failed to show that his injury was causally linked to the allegedly defective control valve. Although the standard for causation in FELA cases is relaxed, the Sixth Circuit has held that when "'there has been a failure of a required appliance, there is liability only where the . . . defective appliance is itself an efficient cause of or the instrumentality through which the injury is directly brought about.'" *Johnson v. Illinois Central Railroad*, No. 96-5911, 1997 WL 720442 (6th Cir. Nov. 13, 1997), quoting *Reetz v. Chicago & Erie Railroad Co.*, 46 F.2d 50, 52 (6th Cir.1931). Liability does not attach when the injury is only an "incidental condition" of the defective appliance. *Id.*

In *Reetz*, the train on which Plaintiff was a conductor came to an emergency stop due to the failure of couplers and drawbars; part of the train had stopped on a bridge that was not fit for pedestrian travel. Plaintiff walked alongside the train in order to locate the source of the problem. As a result of the lack of adequate pedestrian footing at the bridge area, Plaintiff fell fifteen feet and died from his injuries. The Sixth Circuit concluded that, although Plaintiff would not have been walking along the train line had the train not stopped, the defective couplers and drawbars were not the cause of

Plaintiff injuries and subsequent death. Rather, the fall was an "incidental situation" which bore no relation to the defective appliance. *Reetz*, 46 F.2d at 52.

The Court concludes that, in this case, even assuming a violation of either the FSAA or LBIA, Plaintiffs slip while walking the track was only incidentally caused by the alleged appliance violation; the injury was not the "direct or efficient" cause of any alleged appliance violation. As in *Reetz*, although Plaintiff would not have been walking the track to inspect but for the allegedly defective appliance, his subsequent slip and injury bears too tenuous a connection with the defective appliance so as to give rise to liability.[4] In any event, however, this Court holds that Plaintiff has failed to present evidence to establish a violation of the FSAA or the LBIA. Thus, the Defendant is entitled to summary judgment.

IV.

In light of the foregoing, the Defendant's Motion for Summary Judgment (Doc. # 21) is GRANTED. This action is hereby DISMISSED. The Clerk is DIRECTED to enter Judgment accordingly.

IT IS SO ORDERED.

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[4] The Court rejects Plaintiffs assertion that this case is analogous to *New York Cent. R. Co. v. Brown*, 63 F.2d 657 (6th Cir.1933), in which the Sixth Circuit held that the jury should consider whether a brakeman could recover for injuries sustained from electrical shock which occurred while the plaintiff was reaching for the brake wheel which allegedly malfunctioned. In that case, the injury bore a much closer relationship to the allegedly defective appliance than does Plaintiffs injury in the case at bar.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed Jul 17, 2003]

HONAS H. RICHARDS,
Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee.

ORDER

BEFORE: MARTIN Chief Judge; ROGERS, Circuit Judge; and EDMUNDS,[1] District Judge.

The court having received a petition for rehearing en banc and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, CLERK

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[1] Hon. Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX D

FEDERAL EMPLOYERS' LIABILITY ACT (excerpts)

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

45 U.S.C. § 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

SAFETY APPLIANCE ACT (excerpt)

49 U.S.C. § 20302. General requirements

(a) General.—Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines—

(1) a vehicle only if it is equipped with—

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if—

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

* * * *

(Added Pub. L. 103-272, § 1(e), July 5, 1994, 108 Stat. 881.)

Supreme Court, U.S.
FILED
NOV 13 2003
OFFICE OF THE CLERK

No. 03-574

In The Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

HONAS RICHARDS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit correctly ruled that the Plaintiff had come forward with enough evidence of proximate cause to preclude summary judgment under the Federal Employers' Liability Act, which vests authority in the jury, except in cases where there is no evidence of causation.

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STATEMENT OF THE CASE

The Sixth Circuit applied the legal standard consistently articulated by this Court in cases brought under The Federal Employers' Liability Act (FELA) and The Federal Safety Appliances Act (FSAA). The Sixth Circuit concluded that the district court's grant of summary judgment in defendant's favor was inconsistent with the proximate cause standard established by this Court early last century and reaffirmed as recently as last Term. This oft cited proximate cause standard requires that FELA and FSAA cases proceed to the jury where "the proofs justify with reason the conclusion that employer [conduct] played any part, *even the slightest*, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 508 (1957) (emphasis added)

I. History of Proceedings Below

This case involves a typical railroad accident that occurred on May 1, 1999. On September 10, 2001, the district court for the Southern District of Ohio granted the Railroad's Motion for Summary Judgment, holding that plaintiff had not come forward with sufficient evidence of proximate causation.

The Sixth Circuit reversed, holding that the district court improperly applied this Court's FELA proximate cause standard to the particular facts of this case. Thereafter, the Railroad filed a petition for rehearing and rehearing en banc in which the Railroad urged the Sixth Circuit to reconsider its ruling based on purported conflicts with the decisions of this Court and other circuits and, indeed, other Sixth Circuit precedents – the exact same argument raised in the Railroad's petition to this Court. The Sixth Circuit unanimously denied

the petition, noting that "no judge of this court [had] requested a vote on the suggestion for rehearing en banc."

II. Statement of Facts

On May 1, 1999, Respondent Honas Richards was employed as a Conrail freight conductor. Near Columbus, Ohio, his train made an emergency application of the air braking system, bringing the train to an unexpected stop. An "emergency" brake application, especially one that the crew does not initiate, can be very dangerous. It can result in derailments, the tossing of employees on the train, the shifting of freight, etc.[1]

Because of this potential for danger, Conrail's rules and common sense mandate that the conductor attempt to determine the cause of the undesired brake application. Getting off the train and walking its length -- no matter how unsafe the ground conditions -- is the only way to do this. While "walking the train," the employee looks for visible defects that may have caused the undesired brake application, such as derailed cars, shifted freight, and other dangerous conditions that can cause an emergency brake application. Mr. Richard's train went into its emergency brake application on the "main track." Railroad tracks are covered with "ballast." Main line track ballast consists of large, loosely

[1] An emergency application of the braking system occurs when the air pressure in the brake system drops suddenly resulting in a much faster than usual application of the air brakes. The crew can initiate an "emergency" application when it needs to quickly stop the train. In addition to a deliberate application of the train's air brake system, trains can also unexpectedly go into "emergency" if the train or air hoses becomes uncoupled or an air hose bursts. (www.trainweb.org/railwaytechnical, North American Freight Train Brakes section, Emergency Braking subsection).

packed rocks. They are very difficult to walk on because the rocks shift, collapse, and move. While Mr. Richards was walking on the ballast, the ballast shifted and/or collapsed beneath his feet. He felt extreme pain in his back, as his body twisted, while trying to prevent his fall.

Mr. Richards was the only employee to inspect the train after it went into "emergency." He had approximately 50 years of railroad experience. This experience included attending classes concerning air brakes, including how the air brake system operates, the functions of the different parts of the air brake system, how and why brake systems malfunction, and what happens during a brake system malfunction. While "walking the train," Mr. Richards eliminated most of the probable causes for the undesired air brake application. There were no leaking air hoses or other problems that would permit air to escape from the air brake system. Using a process of elimination, he concluded that "the only reasonable explanation why that train went into emergency" was "a defective control valve," also known as a "kicker." When asked whether the train would have gone into "emergency" had the kicker been properly functioning, he responded, "Oh, absolutely not." (R 21: Motion, Richards Deposition at 5, 13, 26-27, 80, 91-92, Sixth Circuit JA at 78, 86, 99-100, 153, 164-165; R 24: Motion Response, Richards Affidavit at ¶5, Sixth Circuit JA at page 195)

III. The Court of Appeals Decision

The Sixth Circuit reversed and held that the district court improperly applied this Court's FELA proximate cause standard to the specific facts of this accident. It acknowledged that an antiquated Sixth Circuit decision, pre-dating the FELA's 1939 Amendments, *Reetz v. Chicago & Erie R.R.*, 46 F.2d 50 (6th Cir. 1931), employed an

inappropriately narrow proximate cause analysis. Therefore, it overruled *Reetz* and held that, under the facts of this case, there was proximate cause because "a reasonable jury could conclude that the defective appliance played *any* part, even the slightest, in bringing about the plaintiff's injury." It concluded that "if a reasonable jury could find that the plaintiff's injury 'was within the risk created by' the defective appliance, the plaintiff's right to a jury trial should be preserved." Pet. App. 14a.

REASONS FOR DENYING THE PETITION

Conrail's Petition fundamentally misunderstands the Sixth Circuit's decision. Properly analyzed, that decision provides no compelling reason – in fact, no reason at all – for this Court to grant certiorari. The Sixth Circuit's decision does nothing more than apply the decisions of this Court to the specific facts of Mr. Richards' accident. And it does so consistent with decisions of other federal and state courts of appeals.

I. Review Should Be Denied Because The Sixth Circuit's Decision Is Interlocutory.

Before turning to the bases for review asserted by petitioner, Mr. Richards wishes to draw to this Court's attention a barrier to review that is wholly ignored in the petition: the interlocutory nature of the Sixth Circuit's ruling below.

Although this Court may exercise jurisdiction under 28 U.S.C. § 1254(1) to review interlocutory decisions of federal courts of appeals, it rarely does so, and this case is not the rare case in which interlocutory review is appropriate. "Ordinarily, in the certiorari context, 'this court should not

issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, *unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.*'" Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002) (quoting *American Construction Co. v. Jacksonville, T. & K.W. Railway Co.*, 148 U.S. 372, 384 (1893) (emphasis added)); *see also, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. Co.*, 240 U.S. 251, 258 (1916) (interlocutory decisions are reviewed only "in extraordinary cases"). This case is anything but "extraordinary." Mr. Richards filed a garden-variety FELA/FSAA case in federal district court, which granted summary judgment to the defendant railroad. The Sixth Circuit reversed and directed simply that, as to causation, the case must be allowed to go to the jury. The defendant retains all other defenses it may have, and the jury is free to decide in favor of the defendant on causation and any other permissible ground. If the defendant prevails, no further review on the question presented would be necessary.

Of course, Mr. Richards believes that his case is meritorious and that he will prevail before a jury. If that occurs, there will be a final non-interlocutory judgment from which the railroad may appeal and ultimately present the causation (and any other federal issue) to this Court for resolution. Indeed, this case is less an appropriate vehicle for immediate, interlocutory review than was true in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993). In *VMI*, the Fourth Circuit had issued a final decision holding that the Commonwealth of Virginia's, sponsorship of a military college for men but not a military college for women, was unconstitutional, but the district court had yet to rule on the appropriate remedy. The Court denied certiorari on the ground that the decision was not sufficiently final because the remedy phase had not occurred. *See id.* (Scalia, J.,

concurring). The Court recognized that there would be time enough to review the decision, if necessary after the remedial portion of the case was decided, *id.*, and, in fact, it later did so. *United States v. Virginia*, 518 U.S. 515 (1996). Here, of course, a final decision is lacking, not only as to remedy (damages), but as to liability as well.

If, in the future, Mr. Richards were to be awarded damages, this Court could later review the question presented in a subsequent petition. *See* 508 U.S. 946 (Scalia, J., concurring). Moreover, unlike the *VMI* case, which was *sui generis*, here, if petitioner is correct that the lower courts are in disarray over the question presented — a point with which Mr. Richards strenuously disagrees — there will be any number of other, *appropriate* future vehicles that would allow this Court to address the question presented.

II. The Sixth Circuit Has Properly Applied This Court's FELA Proximate Cause Standard.

A. The Sixth Circuit Did Not Reject *Davis v. Wolf* Nor Did It Hold That Proximate Cause Did Not Apply In FELA Cases.

The decision below is consistent with all decisions of this Court, including *Davis v. Wolf*, 263 U.S. 239 (1923). The Sixth Circuit did not reject the necessity of showing proximate cause in FELA cases. On the contrary, in rejecting its antiquated *Reetz* decision, the Sixth Circuit substantially relied upon the rationales of two other courts, both of which used the proper proximate cause standard.

New York, New Haven and Hartford R. Co., v. Leary, 204 F.2d 461 (1st Cir. 1953), involved a defective air brake system, which caused the train to stop. The plaintiff exited

the train, in the fog and dark, to inspect the problem and repair it. While doing so, he fell off a railroad trestle that had no sides or railings. In rejecting *Reetz*, the First Circuit relied on the following statements in *Coray v. Southern Pacific Co.*, 335 U.S. 520, 522-23 (1949), "In this case where undisputed evidence established that the train suddenly stopped because of defective air-brake appliances, petitioner was entitled to recover if this defective equipment was the **sole or a contributory proximate cause** of the decedent employee's death. . ." *Id.* at 522-523 (emphasis added).

Warning v. Thompson, 249 S.W.2d 335 (Mo. 1952), involved an employee injured while attempting to repair defective locomotive sanders. The Supreme Court of Missouri, in rejecting *Reetz* specifically cited this Court's decision in *Davis*, stating, "The employee may recover 'if the failure to comply with the requirements of the [Locomotive Inspection] Act is a **proximate cause** of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.'" *Id.* at 340 (emphasis added).

After citing *Leary* and *Warning* with approval, the Sixth Circuit below concluded, "We now join those courts that have rejected *Reetz*." By joining the *Leary* and *Warning* courts, the Sixth Circuit embraces *Davis* and its proximate cause standard. The inconsistency between the Sixth Circuit and this Court, suggested by the Petitioners, is nonexistent.

B. The Sixth Circuit Did Not Effectively Hold That *Rogers* Overruled *Davis v. Wolf,* But Rather It Recognized That *Rogers* Applied The Concept Of Proximate Cause Used In *Davis*.

The Petition wrongly argues that the Sixth Circuit assumed that *Davis* is no longer good law, that it has rejected the FELA proximate cause standard, and that it has replaced it with the standard set forth in *Rogers*. The fundamental flaw in Petitioner's argument is that it assumes that *Davis* and *Rogers* are incompatible. *Rogers* does not eliminate the concept of proximate cause, but further elucidates this Court's definition of "proximate cause" in FELA/FSAA cases.

Prior to the 1939 Amendments to the FELA, the courts interpreted the statute very narrowly – in other words, favorably to defendants. Although this Court immediately recognized the liberalizing effect of the 1939 Amendments, *Lilly v. Grand Trunk Western R. Co.,* 317 U.S. 481, 486 (1943); *Urie v. Thompson,* 337 U.S. 163, 180-81 (1949), the lower courts were slow to adjust their thinking. In 1957, this Court observed, "In a relatively large percentage of the cases reviewed, the Court has found that lower courts have not given proper scope to . . . the congressional scheme." *Rogers,* 352 U.S. at 510. The Court went on: "The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." *Id.* at 509.

This Court noted the following important Congressional policy behind the FELA:

> The **Congress** when adopting the law **was particularly concerned that the issues** whether there was employer fault and whether that fault played any part in the injury or death of the employee **should be decided by the jury** whenever fair-minded men could reach these conclusions on the evidence. Originally, judicial administration of the 1908 Act substantially limited the cases in which employees were allowed a jury determination. * * * Congress corrected this by the 1939 amendments and removed the fetters which hobbled the full play of the basic congressional intention to leave to the fact-finding function of the jury the decision of the primary question raised in these cases--whether employer fault played any part in the employee's mishap."

Id., 352 U.S. at 508-09 (emphasis added).

Because the concept of proximate cause is so difficult to define, this Court chose to instruct the lower courts by articulating what the term "proximate cause," as used in *Davis*, means in FELA/FSAA cases after the 1939 Amendments:

> "For practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit."

Id. at 508.

During the past 50 years, and as recently as last Term, this Court has consistently reaffirmed the definition of proximate cause that it articulated in *Rogers*. *See Norfolk &*

Western Ry. Co. v. Ayers, 123 S.Ct. 1210, 1226 (2003)(citing *Rogers*); *Gotshall v. Consolidated Rail Corp.*, 512 U.S. 532, 542-543 (1994)(citing *Rogers*); *Atchison, Topeka And Santa Fe Ry Company v. Buell,* 480 U.S. 557, 562 n. 8 (1987)(citing *Rogers*).

The Sixth Circuit below applied *Rogers'* definition of proximate cause to the specific facts of Mr. Richard's accident:

> As other courts have recognized, however, a jury might reasonably have concluded that Richards only was injured because the braking system failed to function properly, it was his duty to identify and remedy the defect, and the proper method for fulfilling his responsibilities was walking the train. ***Rogers* makes clear that where the evidence allows more than one outcome on the issue of causation, the issue should be decided by a jury, not a judge.** *Rogers,* 352 U.S. at 506-07, 77 S.Ct. 443. * * * **Courts in FSAA cases (and FELA and BIA cases as well) should focus on whether a reasonable jury could conclude that the defective appliance played *any* part, even the slightest, in bringing about the plaintiff's injury.** This means that if a reasonable jury could find that the plaintiff's injury "was within the risk created by" the defective appliance, the plaintiff's right to a jury trial should be preserved."

Pet. App. 14a (emphasis added).

In other words, the Sixth Circuit analyzed the peculiar facts of Mr. Richards' railroad accident and concluded that a reasonable jury could find that his injuries were caused by the defective air brake system. The Sixth Circuit did not ignore

the concept of proximate cause, it did not reject the *Davis v. Wolf* requirement of proximate cause, and it did not rule that *Rogers* abrogated *Davis*. Instead, using this Court's definition of proximate cause in *Rogers*, the Sixth Circuit concluded that causation might exist under the facts of this case and that the district court erred in its application of this Court's long-standing case law.

In sum, the Sixth Circuit committed no legal error, let alone one worthy of certiorari.

III. The Decision Below Is Not In Conflict With Any Decisions Of This Court Nor Are The Federal And State Appellate Courts In Conflict Over The Applicable Proximate Cause Standard In FELA/FSAA Cases.

Petitioner's assertion that there is a conflict in the courts on the proximate cause standard to be applied in FELA/FSAA cases lacks merit. This supposed "conflict" results solely from the proper application of this Court's decisions to varying factual situations. Furthermore, while some courts describe the proper standard in slightly different terms, an examination of the cases reveal that their analytical processes are consistent with each other and with the decisions of this Court. The asserted conflict is thus illusory.

Petitioner cites several cases for the proposition that *Rogers* did not eliminate the concept of "proximate cause" in FELA cases. *See* Pet. at 19-22. These cases need not be addressed individually because Respondent agrees with this statement of law. As noted in Part I above, the decision below does not assert that *Rogers* eliminated the FELA's proximate cause requirement. Rather, the Sixth Circuit recognized that proximate cause must be established in FELA

cases and that *Rogers* defines the concept of proximate cause in light of the 1939 FELA Amendments. Hence, there is no conflict between the Sixth Circuit and those cited cases.

Petitioner argues that the Sixth Circuit's decision conflicts with *Reed v. Pennsylvania R. Co.*, 171 N.E.2d 718 (Ohio 1961), *cert. denied*, 366 U.S. 936 (1961). It does not. Both courts applied the same standard of law. However, the facts in *Reed* are significantly different from the facts here and this difference accounts for the divergent results. Mr. Richards "only was injured because the braking system failed to function properly, **it was his duty to identify and remedy the defect**, and the proper method for fulfilling his responsibilities was walking the train." Pet. App. 14a (emphasis added). However, in *Reed*, the employee "**was not required to and did not help in repairing such defect** but after stopping the train 'just sat' in the engine cab for 45 minutes." *Reed,* 171 N.E.2d at 718 (emphasis added). This distinction is important because here it was **the defective brakes** that required Mr. Richards to be in a dangerous place, while it *Reed,* the defective brakes were not the reason that the plaintiff was in a dangerous place.

Nor does the decision below conflict with *Marazzato v. Burlington Northern R. Co.*, 817 P.2d 672 (Mont. 1991). *Marazzato* resulted in a different outcome from the Sixth Circuit below because of different facts. In *Marazzato,* an employee committed suicide allegedly because his employer required him to remain in a room without supervised work activities during his shift. The court affirmed the grant of summary judgment because the employee "had not established that it was foreseeable by Burlington Northern that its actions would result in the decedent's suicide." *Id.* at 673. In this case, however, it was not only foreseeable that a defective air

brake system would require the employee to walk the train on dangerous terrain, but it was required by Conrail rules.

The Petitioner also cites *Chapman v. Union Pacific R.R.*, 467 N.W.2d 388 (Neb. 1991), however this decision is even farther afield than the other cases cited. *Chapman* did not address FELA proximate cause, but instead focused on whether the employee presented sufficient medical causation evidence that his injuries had been caused by the absence of a headrest in a railroad motor vehicle which had been rear-ended in a routine traffic accident. *Id.* at 396.

Finally, in an effort to establish a conflict, Petitioner lists several other cases that it asserts eliminate the proximate cause requirement in FELA/FSAA cases. Careful analyses of these cases demonstrate that Petitioner's characterization is inaccurate. These cases, while sometimes using imprecise language, all use a mode of analysis that demonstrates the courts' recognition that proximate cause is applicable in FELA/FSAA cases.[2]

[2] *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1355 (5th Cir. 1988), *cert. denied, 488 U.S. 968* (1988)(emphasis added)(The Court of Appeals accepted the need for proximate cause in a Jones Act case, which is similar to a FELA case: "we hold that the district court was not clearly erroneous in finding that the M/V CHAMPION EXPRESS was unseaworthy and this unseaworthiness **was a proximate cause** of Johnson's injury. "); *Paige v. St. Louis S.W. Ry.*, 312 F.2d 84, 92 (5th Cir. 1963)(emphasis added)(Contrary to Petitioner's assertion, the court did not reject proximate cause in FELA cases. The Fifth Circuit explained, "This case **does not call for any wholesale condemnation of the use of language of proximate causation in cases under this Act**. Our holding is confined to the instructions and the **facts of this particular case**."); *Armstrong v. Kansas City Southern Ry. Co.*, 752 F.2d 1110, 1113 (5th Cir. 1985)(The court recognized the need for proximate cause in FELA cases, but also understood that *Rogers*

defined proximate cause in cases brought under the statute.); *Nicholson v. Erie R.R Co.*, 253 F.2d 939 (2d Cir. 1959)(emphasis added)(Although the Second Circuit uses imprecise language in discussing the standard that applies in FELA cases, the court's analysis demonstrates its understanding that proximate cause applies in FELA cases and the court applied it. The court held, affirming the dismissal of the employee's case, "causation certainly would not even meet the modest requirements of the terms of the F.E.L.A. The fault would be **too far removed** both in space and time from the injury."); *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54 (2d Cir. 1996) (The court did not reject proximate cause nor suggest that it was unnecessary in FELA cases. Instead, the court utilized the *Rogers* definition of proximate cause and applied this Court's proximate cause analysis in *Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108 (1963)); *Fletcher v. Union Pacific R.R.*, 621 F.2d 902 (8th Cir. 1980), *cert. denied,* 449 U.S. 1110 (1981)(The *Rogers* proximate cause definition is briefly mentioned, but it is not discussed. This case only concerned the application of the FELA's statute of limitations to occupational and traumatic injuries.); *Claar v. Burlington Northern R.R.*, 29 F.3d 499 (8th Cir. 1994) (This court correctly noted that the proximate cause standard in FELA cases is less stringent than in common law cases and cited the *Rogers* definition of FELA proximate cause. The court's analysis demonstrates that it did not ignore the concept of causation and the court agreed that dismissal of the employees' claims was proper.); *Oglesby v. Southern Pacific Transportation Co.*, 6 F.3d 603 (9th Cir. 1993) (The court did not reject proximate cause in FELA cases. Instead, it cited *Davis* and *Rogers*, holding that *Davis* requires proximate cause in FELA cases and that *Rogers* defines what that concept means in FELA cases.); *Summers v. Missouri Pacific R.R. System,* 132 F.3d 599, 607 (10th Cir. 1997)(Although the court did suggest that proximate cause is no longer necessary, analysis of the case reveals that this statement is not as sweeping as it appears. The Tenth Circuit used the words "sole cause" and "proximate cause" synonymously. It noted, "The phrase 'resulting in whole or in part' was obviously designed to make even more explicit that negligence of an employer did not have to be the sole

IV. No Policy Reasons Compel Review.

Petitioner makes some sweeping policy statements that will be addressed briefly. First, it suggests that this Court should address when a FELA case must go to a jury because this Court has not addressed the standard in 50 years. Not so. Just last Term, in *Ayers*, 123 S.Ct. at 1226, the Court cited and reaffirmed the validity of the *Rogers* definition of proximate cause in FLEA cases. It also did so in the 1994 *Gotshall* decision, 512 U.S. at 542-43, and the 1987 *Buell* decision, 480 U.S. at 557, 562 n. 8.

Petitioner also suggests that *Rogers'* proximate cause standard should not apply in FSAA cases, because an award against the railroad would not be reduced by any contributory negligence. It refers to this outcome as "senseless." However, this Court has previously addressed this allegedly "harsh" outcome, in *Coray*,

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cause or 'the proximate cause' of the injury in order to justify recovery." The court further explained that under *Rogers*, traditional common law causation standards are replaced by the requirements of the statute defined in *Rogers*.); *McCalley v. Seaboard Coast Line R.R.*, 265 So.2d 11 (Fla. 1972)(Respondent admits that this case appears to broadly dispense with proximate cause in FELA cases. However, the decision is not as broad as it first seems. The court indicated that federal law had "substantially modif[ied] the classic concept of proximate cause" in FELA cases. Modified is different from eliminated. Furthermore, a later Florida Supreme Court case, *Adams v. Seaboard Coast Line R.R.*, 296 So.2d 1 (Fla. 1974), does not dismiss the railroad's proximate cause argument, but merely finds that under the *Rogers* definition of proximate cause, the employee's case was properly submitted to the jury which entered a verdict for the employee. Florida courts review FELA cases using a proximate cause analysis.)

> "The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained. And to make its purpose crystal clear, Congress has also provided that 'no such employee * * * shall be held to have been guilty of contributory negligence in any case' where a violation of the Safety Appliance Act, such as the one here, 'contributed to the * * * death of such employee.' **Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads** and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages."

335 U.S. at 524 (emphasis added). The outcome is not "senseless" as suggested by the Petitioner, but consistent with Congress' imposition of an "extraordinary safety obligation" on railroads. Petitioner's policy concern should be addressed to Congress, not this Court.

Finally, Petitioner argues that if courts continue to follow *Rogers'* definition of proximate cause in FELA cases, there will be "grave ramifications" and an "unwarranted expansion of railroad liability." Lower courts have been applying *Rogers* for almost 50 years and as noted above, this Court has consistently reaffirmed it as recently as last year. Petitioner has made no showing that FELA liability has expanded in recent years or that Congress' will has been thwarted in any way. In any event, if Petitioner's concerns about increasing railroad liability are correct, they are correct only because of

Congress' policy of maximum protection for railroad employees. Those arguments should be addressed to Congress, not this Court.

CONCLUSION

The Petition for a Writ Certiorari should be denied.

Respectfully submitted,

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November 13, 2003

Supreme Court, U.S.
FILED
NOV 25 2003
OFFICE OF THE CLERK

No. 03-574

IN THE

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

HONAS RICHARDS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF

As the petition demonstrates, the decision below satisfies every criterion for review by this Court. The Sixth Circuit rejected as "no longer ... good law" the test for causation under FELA announced by this Court in *Davis* v. *Wolfe*, 263 U.S. 239 (1923). By arrogating to itself the power to overrule decisions of this Court, it "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). And in so doing, it widened an already-mature conflict—indeed, a decades-old conflict—among numerous state and federal courts about the causation standard applicable under FELA. These conflicts, too, warrant review by this Court. *Id.* 10(a). The critical importance of this issue, which applies to every FELA claim, only confirms the need for plenary review.

Respondent attempts to save the decision below by implausibly recasting it as merely an application of this Court's longstanding proximate causation standard announced in *Davis*. This contention is untenable given that the Sixth Circuit (1) expressly abrogated the "incidental condition" test of proximate causation established in *Davis* and followed in *Reetz* v. *Chicago & Erie Railroad*, 46 F.2d 50 (6th Cir. 1931), in favor of its own causation test; (2) held that *Reetz* "no longer is good law" after *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), Pet. App. 14a, not that it merely misapplied this Court's *prior* decision in *Davis*; and (3) has previously held that proximate causation has no place in FELA, *Tyree* v. *New York Central Railroad*, 382 F.2d 524, 529 (6th Cir. 1967). In all events, regardless of how the decision is characterized, the circuit courts and state supreme courts are irreconcilably split on the standard of causation under FELA, and this Court's intervention is imperative.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH BINDING PRECEDENT OF THIS COURT, WHICH THE COURT OF APPEALS DEEMED TO BE OVERRULED.

The petition demonstrates that the decision below stands squarely in conflict with *Davis*. The Sixth Circuit deemed the rule established in *Davis* to have been abrogated by this Court's subsequent decision in *Rogers*. See Pet. 9-19. The Sixth Circuit's ruling—a violation of the judicial chain of command and, furthermore, erroneous—should be reviewed. Respondent attempts to explain away this judicial misstep on the theory that "the Sixth Circuit did not effectively hold that *Rogers* overruled *Davis v. Wolfe*, but rather it recognized that *Rogers* applied the concept of proximate cause used in *Davis*." Brief in Opposition ("BIO") 8 (capitalization omitted). The opinion below belies that assertion. Because Respondent misstates the manner in which the opinion below treated these prior decisions of this Court, it is important briefly to rehearse those precedents.

In *Davis*, the Court synthesized prior cases regarding the causation standard under FELA. In so doing, it (1) reaffirmed that FELA plaintiffs must demonstrate that railroad conduct was a "proximate cause" of their damages; and (2) distinguished the notion of "proximate cause" from the creation of an "incidental condition or situation" that caused the plaintiff's injury:

> The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, *but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury*; and, on the other hand, *he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident*, resulting in injury to him while in the discharge of

> his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.

263 U.S. at 243 (emphases added).

In *Reetz*, the Sixth Circuit implemented this rule—as, of course, it was bound to do under *Davis*. 46 F.2d at 51-52. The Sixth Circuit repeated in full the above-quoted language from *Davis*, *id.* at 51; repeatedly used the term "proximate cause," *id.* at 50, 51, 52; and analyzed the distinction drawn in *Davis* between proximate causation and the creation of incidental conditions in which the plaintiff is injured, *id.* at 52. Since the early part of the twentieth century, therefore, the *Davis* distinction has governed proximate cause under FELA across the country, and certainly in the Sixth Circuit.

Respondent's assertion that the Sixth Circuit merely corrected *Reetz*'s misapplication of the *Davis* proximate causation standard has no foundation in the opinion below. It is beyond dispute that the court below improperly abrogated the *Davis* test. The Sixth Circuit began by recognizing that:

> [p]rior to *Rogers*, several courts analyzed the issue of causation by distinguishing situations where the defective appliance was "the cause of or the instrumentality through which the injury [was] directly brought about" from instances where the defect merely was incidental in creating the condition in which the plaintiff was injured,

Pet. App. 8a-9a. To be sure, the court neglected to acknowledge expressly that this Court (in *Davis*) had been one of those "several courts." Nonetheless, the Sixth Circuit then stated that "[a]s the district court relied on this incidental situation versus instrumentality distinction to decide the present matter, this court must determine whether *Reetz* still is applicable to decide causation in FSAA cases following *Rogers*." *Id.* at 9a. It observed that since *Rogers*, the Sixth Circuit had been inconsistent in its adherence to the "*Reetz* distinction," but that "[i]n none of the cases declining to apply

Reetz' distinction ... has the court overruled that decision." *Id.* at 9a-10a.

The Sixth Circuit then proceeded to criticize as "troublesome" the distinction between proximate causes and "incidental conditions" drawn in *Davis*. Pet. App. 13a ("determining in a given case whether an alleged defect is the proximate cause or merely a condition of the plaintiff's injury is often a troublesome matter"). It then dispensed with this distinction as "no longer ... good law" "in light of *Rogers*," *id.* at 14a, which it viewed as having "announced a relaxed test for establishing causation in FELA cases," *id.* at 7a. According to the Sixth Circuit, a court may no longer (as *Davis* had held, 263 U.S. at 243) rule in favor of a defendant if a SAA violation did no more than create an "incidental condition or situation" in which the plaintiff was injured. Now, the claim survives for trial if "a reasonable jury could conclude that the defective appliance played *any* part, even the slightest, in bringing about the plaintiff's injury," *i.e.*, if such "injury 'was within the risk created by' the defective appliance." Pet. App. 14a. Thus, on the theory that there existed a conflict between the logic of *Davis* and *Rogers*, the court below determined that the latter overruled the former—a conclusion that was emphatically *not* within the Sixth Circuit's province, see *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) ("it is this Court's prerogative alone to overrule one of its precedents"). Pet. App. 8a-9a, 14a.

Contrary to Respondent's claims, it is of no moment that the Sixth Circuit euphemistically referred to the test it overruled as the "*Reetz* distinction" rather than the "*Davis* distinction." A court of appeals may not insulate its decision from review by purporting to overrule circuit precedent, rather than the decision of this Court that the prior circuit precedent strictly followed. It is also irrelevant that the Sixth Circuit found the outcome of its ruling consistent with certain *pre-Rogers* cases that had rejected *Reetz* under a proximate cause standard. BIO 6-7; Pet. App. 10a-13a (discussing *N.Y., New*

Haven & Hartford R.R. v. *Leary*, 204 F.2d 461 (1st Cir. 1953), and *Warning* v. *Thompson*, 249 S.W.2d 335 (Mo. 1952)). The bottom line is that the Sixth Circuit *rejected* the substantive standard of causation established by *Davis*, and that creates a stark conflict with the precedents of this Court that warrants review.[1]

The Sixth Circuit's decision to treat the reasoning of *Davis* as anachronistic—which it had no authority to do in any event—was, furthermore, erroneous. As the petition demonstrates, *Rogers* did not overrule *Davis*. Pet. 15-16. The two cases dealt with entirely different aspects of causation. Whereas *Davis* established the minimum causal proximacy between railroad action and employee injury that the employee must show, *Rogers* dealt with the circumstances under which a claim must be submitted to a jury when there is evidence of multiple possible causes of the injury. See *id.* And to the extent *Rogers* did mention FELA's standard of proximacy, it worked no new law; it simply applied past precedents that themselves relied upon *Davis*. See *id.* at 16.[2]

In short, this case squarely and cleanly presents an important legal issue—namely, whether *Rogers* overruled *Davis*—that the court below resolved erroneously, and in contravention of Supreme Court precedent.[3] As such, it deserves this Court's review.

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[1] Indeed, Respondent fails to identify anything in the opinion below that could conceivably be read as holding that *Rogers* was an application of *Davis*. And with good reason: At no point did the court below suggest that *Rogers* applied the *Davis* standard of proximate cause. And at no point did that court even purport to apply *Davis*.

[2] Respondent is quite mistaken to contend that our argument assumes *Rogers* and *Davis* to be "incompatible." BIO 8. To the contrary, and as explained at some length in the petition, Pet. 9, 13-16, those cases are fully compatible. It is the courts (including the court below) that have taken differing approaches to whether *Davis* and *Rogers* are in tension and, if so, how to reconcile them. *See infra* at 7-10.

[3] For this reason, it is of no moment that the issue arises in an interlocutory posture. It is well-established that "the interlocutory status of the

II. THE DECISION BELOW WIDENS VARIOUS LOWER COURT DECISIONAL CONFLICTS OVER THE MEANING OF *ROGERS* AND THE CAUSATION RULE APPLICABLE UNDER FELA.

As the petition demonstrates, the lower courts have made a hash of the FELA causation standard in general, and of the relationship between *Rogers* and *Davis* in particular. The

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case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." R. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002). Here, the case would be over if the Sixth Circuit had properly affirmed the district court's grant of summary judgment under the *Davis* standard. Moreover, nothing is to be gained in awaiting trial since the plaintiff will no doubt seek to have the *Rogers* "slightest cause" standard included in the jury instructions on causation, even though *Rogers* was explicit that this standard is only "the test of a jury case" where there is evidence of multiple causation, 352 U.S. at 506. Delaying review for trial on an improper legal standard will simply waste federal judicial resources.

Respondent's suggestion that this Court "rarely" reviews nonfinal decisions of lower federal courts, unless they are "'extraordinary,'" BIO 4, 5, is thoroughly belied by this Court's actual practice. Last Term, this Court reviewed more than two dozen such cases. These included numerous cases arising in a posture similar to the case at bar. *E.g.*, *City of Los Angeles* v. *David*, 123 S. Ct. 1895 (2003) (reviewing reversal of summary judgment); *Clackamas Gastro. Assocs., P.C.* v. *Wells*, 123 S. Ct. 1673 (2003) (same); *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003) (same); *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (same); *Boeing Co.* v. *United States*, 537 U.S. 437 (2003) (same); *Borden Ranch P'ship* v. *Army Corps of Eng'rs*, 537 U.S. 99 (2002) (per curiam) (same); *see also Dastar Corp.* v. *Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041 (2003) (reviewing partial affirmance and partial reversal of summary judgment); *Dow Chem. Co.* v. *Stephenson*, 123 S. Ct. 2161 (2003) (per curiam) (reviewing reversal of dismissal of case); *Inyo County* v. *Paiute-Shoshone Indians*, 123 S. Ct. 1887 (2003) (same); *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003) (same); *United States* v. *White Mt. Apache Tribe*, 537 U.S. 465 (2003) (same); *Meyer* v. *Holley*, 537 U.S. 280 (2003) (same); *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (same); *Am. Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374 (2003) (reviewing reversal of preliminary injunction); *Pharm. Res. & Mfrs. of Am.* v. *Walsh*, 123 S. Ct. 1855 (2003) (same).

wildly divergent legal rules announced in the lower courts have led to conflicts on multiple issues, between both state and federal courts. Respondent altogether fails to reconcile the conflicts identified in the petition; his attempt to do so is a jumble of misunderstandings, mischaracterizations and, most revealing, admissions that conflicts in fact exist.

First, the lower courts are divided over whether *Rogers* even spoke to the substantive standard of causation that a plaintiff must prove under FELA. See Pet. 19-20. The court below concluded that *Rogers* did address that issue, for it concluded that *Rogers* overturned the causation standard set forth in *Reetz* and *Davis*. See *supra* at 3-4. So have other courts, as explained in the petition. *E.g.*, *Page* v. *St. Louis S.W. Ry.*, 312 F.2d 84, 89 (5th Cir. 1963) (interpreting *Rogers* as a "departure from traditional common-law tests of proximate causation"); Pet. 23-24 (citing cases). This is Respondent's view of *Rogers* as well. BIO 11; see also *id.* at 8-9.

In direct conflict with this conclusion, other courts have held that *Rogers* did not concern the question of when a railroad's action is a legal cause of a plaintiff's injury, but instead evaluated the very different question of the circumstances under which a case should go to the jury when there are multiple causes of a plaintiff's injury. See Pet. 19-20; see also *id.* at 15-16 (explaining this theory of *Rogers*). In *Marazzato* v. *Burlington Northern Railroad*, for instance, the Montana Supreme Court rejected precisely the theory of *Rogers* that the Sixth Circuit adopted here:

> Mr. Marazzato cites *Rogers* for the proposition that FELA is liberally construed to require only a slight amount of foreseeability to get a FELA case to a jury. The *Rogers* Court went on to say "[i]t does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence." *Rogers*, 352 U.S. at 506. It is obvious from this statement that the *Rogers* case was addressing the issues

> of multiple causes and contributory negligence after it had been established that the employer was negligent.

817 P.2d 672, 674 (Mont. 1991) (alteration in original); see *Strobel* v. *Chi., Rock Island & Pac. R.R.*, 96 N.W.2d 195, 199-20 (Minn. 1959).

Respondent does not even attempt to explain away this conflict. (On the contrary, he appears to misunderstand it as a conflict over the *extent to which Rogers* modified *Davis*, not the antecedent question *whether Rogers* modified *Davis* at all. BIO 11.) On this issue, the conflict is stark: Some courts view *Rogers* as speaking to the proximate cause standard under FELA, whereas others view it as a case about the test for submitting a case to the jury when multiple causes exist.

Second, separate and apart from the conflict over whether *Rogers* modified FELA's test of legal cause, there is a wide-ranging and mature conflict over the proper standard of causation under FELA. The petition demonstrates this conflict, Pet. 20-25, which Respondent has failed to refute.

For instance, with regard to *Reed* v. *Pennsylvania Railroad*, 171 N.E.2d 718 (Ohio 1961), Respondent broadly asserts that "[b]oth courts"—the Sixth Circuit in the decision below, and the Ohio Supreme Court in *Reed*—"applied the same standard of law," and were simply different on their facts. BIO 12. This bald assertion altogether ignores the actual opinion of the Ohio Supreme Court, which applied an entirely different legal test than the court below. *Reed* quoted and relied upon *Davis* for the proposition that proximate causes are actionable under FELA but incidental conditions are not—precisely the distinction that the Sixth Circuit rejected in this case. Compare 171 N.E.2d at 722 (quoting *Davis*), with Pet. App. 9a-10a, 14a (rejecting the "incidental situation versus instrumentality distinction"). Indeed, this distinction was the very holding of the *Reed* court; it was precisely because the court concluded that that case involved an incidental condition

(rather than a direct effect) that it found no liability for the railroad. 171 N.E.2d at 722.

The simple fact is, no matter how this Court views the opinion below, there exists an undeniable and broad-based conflict over the causation standard that applies under FELA. This conflict cannot be explained away on the wishful theory that the differences among the courts are merely semantic. Cf. BIO 11 ("some courts describe the proper standard in slightly different terms"); *id.* at 13 (the cases "sometimes us[e] imprecise language"). On the contrary, there is a substantive division between courts that continue to apply proximate cause, and those that believe proximate cause to have been abolished by *Rogers*.

It is beyond dispute that, in contrast to *Reed* and other similar cases, see Pet. 20-22, some courts have concluded that FELA requires no showing of proximate cause. In fact, buried in a footnote, Respondent concedes as much. BIO 14 n.2 In *Summers* v. *Missouri Pacific Railroad Systems*, the Tenth Circuit wrote that *Rogers* "definitively abandoned" proximate cause. 132 F.3d 599, 606 (10th Cir. 1997). In the face of this language, it is simply implausible to assert that the Tenth Circuit "recogni[zes] that proximate cause is applicable in FELA/FSAA cases." *Id.* at 13. Indeed, were it not clear from *Summers* that the Tenth Circuit has abandoned proximate cause, such a rule is plain from *Wilson* v. *Union Pacific Railroad*, 56 F.3d 1226, 1230 (10th Cir. 1995), in which the Tenth Circuit ratcheted down the FELA causation standard to the bare-bones level of "but for" causation.

Numerous other courts have likewise interpreted *Rogers* as having jettisoned proximate cause under FELA. The Ninth Circuit has concluded that after *Rogers*, "'proximate cause' is not required under the FELA." *Oglesby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993). The Second Circuit has held that "to impose liability" under FELA, "the negligence need not be the proximate cause of the injury." *Nicholson* v. *Erie R.R.*, 253 F.2d 939, 940 (2d Cir. 1958). (Given this clear

language, Respondent's contention that *Nicholson* actually applied proximate cause, BIO 14 n.2, is implausible.) The Fifth Circuit has referred to FELA's causation standard as "featherweight," *Johnson* v. *Offshore Express, Inc.*, 845 F.2d 1347, 1352 (5th Cir. 1988), and has contrasted it with proximate cause, *Armstrong* v. *Kansas City S. Ry.*, 752 F.2d 1110, 1114 (5th Cir. 1985).[4] And according to the Florida Supreme Court, "the concept of proximate cause no longer has any place in an action under the Federal Safety Appliance Act." *McCalley* v. *Seaboard Coast Line R.R.*, 265 So. 2d 11, 15 (Fla. 1972); but cf. BIO 15 n.2 (stating that *McCalley* "is not as broad as it first seems"). See also Pet. 23-24 (citing cases).

These multiple, deep-seated conflicts are the result of 50 years of confusion about the meaning of *Rogers*.[5] Only this Court can clarify this issue, for only this Court can resolve the relationship between *Rogers* and *Davis*. The lack of uniformity in this area of national importance fully warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[4] Respondent's attempt to explain *Johnson* is so misleading as to deserve particular comment. Richards asserts that *Johnson* employed proximate cause under the Jones Act (which mirrors FELA). It certainly did not. In applying the Jones Act, *Johnson* used the "featherweight" causation standard. 845 F.2d at 1352. Its only mention of proximate cause—in the language quoted by Respondent, BIO 13 n.2—came in a discussion of a claim for unseaworthiness which, the court took pains to "stress," employs "a more demanding standard of causation," 845 F.2d at 1354.

[5] Respondent asserts that this Court has "consistently reaffirmed" *Rogers*, BIO 9-10, but none of those cases resolved the question presented by this petition or remotely suggested that *Rogers* abrogated the *Davis* "incidental condition" test of causation. *See Norfolk & W. Ry.* v. *Ayers*, 123 S. Ct. 1210, 1226 (2003); *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Buell*, 480 U.S. 557, 562 n.8 (1987). *See* Pet. 24 n.9.

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MOTION FILED
NOV 17 2003

(3)

No. 03-574

IN THE

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

HONAS RICHARDS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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IN THE

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CONSOLIDATED RAIL CORPORATION,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad

[1] The letter expressing consent has been filed with the Clerk of the Court.

industry as a whole—and in those instances such requests have been granted.[2]

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, presents such an issue. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. Because FELA litigation is an ongoing event for all major railroads—several thousand FELA suits are filed each year—AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA. In this case, the court below relied on a prior decision of this Court improperly to expand railroad liability under FELA by abrogating the concept of proximate cause in cases where liability is premised on an alleged violation of a railroad safety statute. This holding, which is the product of a misapplication of a prior precedent of this Court, confers a serious and unwarranted disadvantage on railroad defendants in numerous cases arising under FELA.

When AAR participates as *amicus curiae* in a FELA case, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling by bringing the perspective

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[2] *E.g., National Railroad Passenger Corp. v. Griesser*, 534 U.S. 970 (2001); *Kansas City Southern Ry. Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 U.S. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

of the entire industry, which often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 77 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

appears before Congress, administrative agencies and the courts on behalf of the railroad industry.

One such matter is the Federal Employers' Liability Act (FELA), 45 U.S.C. §51-60, a 95 year old negligence statute under which railroad employees who are injured on the job may seek compensation from the employing railroad. Subsequent to FELA's enactment, every state enacted a workers' compensation law, under which the concept of assigning fault for workplace injuries is abandoned in favor of the principle that all employees suffering legitimate work-related injuries are deserving of compensation.[2] Despite the advent of workers' compensation, FELA remains intact, and each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads.[3] All told, the railroads spend close to a billion dollars annually in the payment and defense of claims brought under FELA. Thus, FELA litigation is an ongoing event for all major railroads, to which they devote substantial legal and financial resources.

This case is of great interest to AAR's members because the issue presented goes to the fundamental nature of FELA as a compensation statute. Despite admonitions from this Court that FELA does not make the employer the insurer of

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[2] Other than railroads, and the maritime industry, to which the substance of FELA applies by virtue of the Jones Act, 46 U.S.C. §688, all industries in the United States are covered by either state or federal no-fault workers' compensation systems. Most states enacted workers' compensation laws of general application between 1910 and 1920, with Mississippi being the last in 1948. Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 41 J.L & Econ. 305, 320 (1998).

[3] During the five year period from 1998 through 2002, nearly 25,000 FELA suits were filed. Data on railroads' FELA experiences are compiled from information provided to AAR by AAR members (and other railroads) in response to annual surveys.

its employees' safety and health, *Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947), numerous lower courts, typically in reliance on this Court's decision in *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957), interpret FELA otherwise. This case is a stark example of the tendency among some lower courts to erode the concept of negligence on which FELA is based, and is representative of what is commonly an overbroad and erroneous reading of *Rogers*. The impact of these decisions on FELA litigation cannot be understated.

The decision below is of great alarm to the nation's railroads because it serves to expand railroad liability under FELA beyond what was intended by the statute or any reasonable reading of this Court's precedents, causing it to resemble a no-fault compensation law. And, because unlike employers subject to workers' compensation, FELA defendants face uncapped liability in each and every case, the decision below foretells serious financial consequences for the nation's railroads. Therefore, this case is of utmost interest to AAR and its members.[4]

STATEMENT OF THE CASE

Amicus adopts the statement of the case in the Petition.

SUMMARY OF THE ARGUMENT

This Court should grant the petition in order to correct a serious misreading of this Court's prior precedent. The court below misread *Rogers v. Missouri Pac. R.R.*, which, properly

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[4] Under workers' compensation laws, compensation awards generally are based on a percentage of the claimant's average wages with a maximum limit. A. Larson & K. Larson, *Larson's Workers' Compensation Law* § 1.03[5] (2000 ed.). In contrast, FELA damages are uncapped. A FELA verdict will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993). ($1.75 million verdict, including over $1 million in intangible damages, not excessive).

read, does not have direct application to this case, while also ignoring another prior precedent that does. As a result, the court below held that the FELA eliminates the concept of proximate cause, badly misconstruing a federal law of unique importance to the railroad industry.

In *Davis v. Wolfe*, this Court held that railroads are not liable for violations of a safety statute where the violation is not the proximate cause of the injury, but only creates an incidental situation that ultimately results in the injury. Subsequently, in *Rogers* this Court held that where there is evidence suggesting more than one possible proximate cause of an injury, the case should go to the jury. *Rogers* and *Davis* addressed different issues, and the former never questioned the latter. Though it is applicable to this case, the court below paid no heed to *Davis*. Rather, it held that as interpreted by *Rogers*, the phrase "in whole or in part" in FELA requires abandonment of the *Davis* holding. However, since FELA's enactment this Court has consistently interpreted the statute to require a showing of proximate cause, and, contrary to the intimation of the court below, Congress has never modified the causation standard originally made part of the statute. Thus, lower courts remain obligated to apply that standard.

While some lower courts continue faithfully to apply the negligence and causation standards which Congress incorporated into FELA, the *Rogers* decision has been utilized by other courts to affect substantive changes to the law of negligence that go far beyond the specific modifications that Congress intended when it enacted FELA. As a result, in many jurisdictions FELA hardly resembles the statute Congress enacted in 1908. This Court should take the opportunity to clarify the *Rogers* holding to assure that lower courts properly interpret the FELA.

ARGUMENT

I. THE COURT BELOW MISINTERPRETED THIS COURT'S DECISION IN *ROGERS* TO ESTABLISH A CAUSATION STANDARD UNDER FELA THAT IS INCONSISTENT WITH CONGRESS' INTENT

> In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond. * * * But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would set society on edge and fill the courts with endless litigation.

Reed v. Pennsylvania R.R., 171 N.E.2d 718, 721 (Ohio 1961)(quoting Prosser on Torts (2d Ed. 1955); *see also, Johnson v. Chicago Great Western Ry. Co.*, 64 N.W.2d 372, 377 (Minn. 1954). Although a physicist might claim that knowing the current state of the universe will allow one to trace events back to the beginning of time (and infinitely into the future), the law traditionally has rejected this deterministic view of the world as a basis for establishing rules for imposing liability for an actor's negligent conduct. Instead, for legal liability to attach, a sufficiently close nexus must be established between the conduct and the harm. RESTATEMENT (SECOND) OF TORTS §431 (1965). Consistent with this principle, Congress intended to incorporate this more bounded concept of legal "cause and effect" when it enacted FELA. In fact, a clear causation rule which applies in the circumstances presented in this case has been establish by this Court. *Davis v. Wolfe*, 263 U.S. 239 (1923). Nonetheless, the court below ignored that precedent, opting instead to add to a line of cases that have served to move FELA ever closer to being a workers' compensation statute which, for better or worse, is contrary to Congress' intent in enacting FELA. Like many of those other lower court decisions, the decision below is grounded in an expansive and

erroneous reading of this Court's decision in *Rogers v. Missouri Pac. R.R.*

A. Though FELA Expressly Modified Some of the Then Prevailing Features of the Common Law, It Retained the Fundamental Principles of the Law of Negligence

In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted FELA as a tort-based remedy for railroad employees injured on the job, who, at that time, had little legal recourse. This was an era when working in the railroad industry was undoubtedly hazardous, and resulted in a great human toll.[5] Moreover, the common law of negligence had erected a number of often insurmountable barriers as obstacles to recovery for injuries sustained by workers.[6]

Against this backdrop, and with the goal of providing a progressive and meaningful remedy, Congress enacted FELA, initially in 1906, and, after addressing constitutional flaws in the original statute, again in 1908.[7] Through FELA, Congress sought to address the perils posed by railroad employment and to provide compensation to employees who suffered injury or death as a result of that employment. *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994).

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[5] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce Commission, *Statistics of Railways in the United States 1908*, 41, 99 (1909).

[6] Any contributory negligence by the plaintiff usually barred recovery. *E.g., Farwell v. Boston & Maine R.R.*, 4 Metc. 49 (Mass. 1842). Recovery also was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Souix City R.R.*, 9 N.W. 581 (1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875).

[7] *Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908); *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

When it enacted FELA, Congress adopted what was at the time the universal compensation model in the United States: the law of negligence. The fundamental policy embodied in FELA was that railroads were to be liable in damages for injuries sustained by employees in the course of their railroad employment when such injuries were caused by the negligence of the railroad. However, to ameliorate the harsh results which often were a consequence of prevailing legal doctrine, Congress modified some aspects of the existing common law in an effort to promote recovery. The defenses of contributory negligence, assumption of the risk and the fellow servant doctrine were all eliminated by FELA. 45 U.S.C. §§ 53 and 54; *see also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916). FELA was an early example of a comparative fault statute. Rather than barring recovery if the employee's negligence contributed to the injury, under FELA damages are reduced in proportion to the employee's negligence. 45 U.S.C. § 53. Notwithstanding these express departures from the common law, it is indisputable that Congress envisioned that the remedy available under FELA would be consistent with the common law concept of negligence, a principle that has consistently been recognized by this Court.[8]

Both prior and subsequent to FELA's enactment Congress enacted railroad safety statutes, and delegated to federal regulatory agencies–first the Interstate Commerce Commission and then the Department of Transportation–authority to

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[8] In *Southern Ry. v. Gray*, 241 U.S. 333 (1916), this Court observed that the rights and obligations under FELA "depend upon applicable principles of common law. . . . Negligence by the railroad is essential to a recovery." *Id.* at 339. Where Congress did not specifically alter the common law, the employee's remedy was to be consistent with common law principles. *Gottshall*, 512 U.S. at 543-44 (1994); *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 429 (1997).

promulgate railroad safety regulations.[9] Although they do not confer a right of action on injured employees, the SAA and LIA are substantively, if not in form, amendments to FELA. *Urie v. Thompson*, 337 U.S. 163, 188-89 (1949). Violation of these statutes constitutes negligence as a matter of law in personal injury lawsuits brought under FELA. *Urie*, 337 U.S. at 189; *O'Donnell v. Elgin, Joliet & E. Ry. Co.*, 338 U.S. 384, 390 (1949); *Philadelphia & R. Ry. Co. v. Auchenbach*, 16 F.2d 550, 552 (3rd Cir. 1926); *Davis v. Hand*, 290 F. 73, 75 (8th Cir. 1923). In addition, violation of a safety statute renders any employee contributory negligence irrelevant. 45 U.S.C. § 53.

Although the railroad safety statutes impose an absolute duty on railroads, just as is the case with liability for negligent conduct under FELA, liability for a safety statute violation attaches only if there is a causal connection between the violation and the complained of injury. *Carter v. Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 434-35 (1949). For nearly half a century after FELA's enactment, this Court issued a number of decisions confirming that the applicable causation standard under FELA is proximate cause. *See* cases cited in Pet. at 10, n. 4. Additionally, several decisions of this Court issued shortly after FELA's enactment addressed the

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[9] *See* Safety Appliances Act of 1893 (SAA), c. 196, 27 Stat. 531 (now codified at 49 U.S.C. § 20301, *et seq.*); Boiler Inspection Act, c. 103, 36 Stat. 913 (now known as the Locomotive Inspection Act (LIA), and codified as amended at 49 U.S.C. §§ 20701-20703); Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-458, 84 Stat. 971, codified as amended at 49 U.S.C. § 20101, *et seq.* In 1966, when the Department of Transportation (DOT) was established, authority for implementing railroad safety laws enacted by Congress, originally a function of the Interstate Commerce Commission, was delegated to the Federal Railroad Administration (FRA), an agency within DOT. Department of Transportation Act, Pub. L. No. 89-670, § 6(e), 80 Stat. 931.

circumstances under which the requisite causal connection exists between a safety statute violation and an injury. *See* cases cited in Pet. at 10.

Although the outcomes of these cases did not always appear consistent, this Court consistently held that a proximate causation standard applied. In *St. Louis & San Francisco R.R. v. Conarty*, 238 U.S. 243 (1915), this Court held that for strict liability due to a safety statute violation to apply, the injured employee had to be within the class of persons the statute's prescriptions were meant to benefit. *Id.* at 249. The Safety Appliances Act requires that all rail cars be equipped with couplers which couple on impact so as to avoid the need for employees to go between cars to couple and uncouple them. Where an employee was riding on the front of a locomotive which collided with a standing car that was missing a coupler, even though the presence of a coupler might have prevented the employee from being crushed, this Court reversed a finding of liability by the lower court, explaining that "[i]t is not claimed, nor could it be, under the evidence, that the collision was proximately attributable to a violation of [the SAA's automatic coupler] provisions, but only that, had they been complied with, it would not have resulted in injury to the deceased." *Id.* However, this Court further explained that "[n]othing in either provision [of the SAA] gives any warrant for saying that they are intended to provide a place of safety between colliding cars." *Id.* at 250. *See also Phillips v. Pennsylvania R.R.*, 283 F. 381 (7th Cir. 1922); *But cf. Louisville R.R. v. Layton*, 243 U.S. 617 (1917) (Liability found where employee preparing to release brake was thrown from a car after collision resulting from the failure of automatic couplers to work.)

Reconciling several prior opinions, in *Davis v. Wolfe* this Court set forth the principle by which lower courts are to determine whether a safety statute violation has a sufficient

causal connection to an injury so that liability for such violation applies without the need to prove negligence.

> [O]n the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while engaged in an operation in which the safety appliances are specifically designed to furnish him protection.

263 U.S. at 243. As petitioner points out, *Davis*, which confirmed the standard of proximate cause, has never been overruled or questioned by this Court.

Nonetheless, the only conclusion which may be drawn from the decision below is that the Sixth Circuit believes otherwise. Treating *Davis* as though it did not exist, but with frequent citation to and in reliance on *Rogers*, the court below overruled a prior Sixth Circuit decision factually similar to the case at bar. The court held that *Reetz v. Chicago & Erie R.R.*, 46 F.2d 50 (6th Cir. 1931), a case that followed *Davis*, "is no longer good law in light of *Rogers*." *Richards v. Consolidated Rail Corp.*, 330 F.3d 428, 437 (6th Cir. 2003). Consistent with the principle established in *Davis*, and in reliance on *Reetz*, the district court had held that "[p]laintiff's slip while walking the track was only incidentally caused by the alleged appliance violation" and "bears too tenuous a connection with the defective appliance so as to give rise to liability." *Richards v. Consolidated Rail Corp.*, 2001 WL 1681107 at *6 (S.D. Ohio 2001). The Court of Appeals, however, held that this tenuous connection did not preclude liability, a change in the law of the Sixth Circuit purportedly compelled by *Rogers*.

B. *Rogers* Neither Compels Nor Supports the Decision of the Court Below

Despite the meaning ascribed to it by many lower courts, a careful reading of *Rogers* reveals that it was not intended to usher in a new era of FELA litigation, in which all notions of proximate cause were to be disregarded. *See* Pet. at 13-17. The opinion in *Rogers* focused on the phrase "in whole or in part" which is contained in the provision of FELA establishing liability for railroad negligence. 45 U.S.C. § 51.[10] *Rogers* read this phrase to mean that Congress intended that a railroad could be found liable if its negligence was a cause, even if not the only cause, of the injury. And, *Rogers* held, in cases where the evidence reasonably lends itself to supporting more than one alternative cause, the jury is to have the opportunity to decide among them. "It does not matter that, from the evidence, the jury may also with reason, on the grounds of probability, attribute the result to other causes, including the employee's contributory negligence." 352 U.S. at 506. Thus, *Rogers* rejected an aberrant notion of proximate cause—requiring that the defendant's negligence be the "sole, efficient, producing cause of injury"—that prevailed in certain common law courts and that was inconsistent with this Court's causation precedents.

In the years following *Rogers*, many courts properly understood that decision to mean simply that if evidence is presented that might reasonably lead to differing conclusions as to the cause of an injury, or to the conclusion that multiple causes contributed to the injury, one among them railroad negligence, the case must go to the jury. *E.g., Ely v. Reading Co.*, 424 F.2d 758 (3rd Cir. 1970); *Funseth v. Great Northern*

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[10] "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury [or death] while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence [of the carrier]." 45 U.S.C. § 51.

Ry. Co., 399 F.2d 918 (9th Cir. 1968). In *Ely*, the court interpreted *Rogers* to mean "that it is not a requisite that the employer's negligence be the entire cause of the accident." 424 F.2d at 762. Instead, the "jury must be instructed to consider that if the negligence of the defendant was one of the proximate causes of the accident, then liability exists." *Id.* In *Funseth*, the court explained that *Rogers* did not purport "to define causality other than to point out that, according to the plain and direct language of the statute, the negligence of the railroad need not be either the sole or the whole cause of the employee's injury" to support a finding of liability. 399 F.2d at 922.[11]

When this case reached the summary judgment stage it simply did not present a question which *Rogers* addresses. The evidence does not lend itself to a jury choosing among multiple possible legal causes of the injury: it is clear and undisputed that the plaintiff's fall on the ballast caused the injury (an event to which no railroad negligence has been attributable). Rather, the question is whether the alleged defect in the brakes–which simply began a chain of events that resulted in the plaintiff walking the track where he ultimately slipped on ballast–was the legal cause, in whole or in part, of the injury. As the district court properly recognized, this is a question to which *Davis* and *Reetz* are applicable.

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[11] *See also Pehowic v. Erie Lackawana R.R.* 430 F.2d 697 (3rd Cir. 1970)(If a jury could find among two reasonable alternative inferences, one of which could support liability, the jury should have that opportunity.); *Strobel v. Chicago, Rock Island and P. R.R.*, 96 N.W.2d 195 (Minn. 1959). ("It is elementary that the negligence of each of two or more actors's may be the proximate cause of an injury and that no actor's negligence ceases to be the proximate cause merely because it does not exceed the negligence of other actors." *Id.* at 200).

C. The Proximate Cause Standard of *Davis v. Wolfe* Remains the Law Today

As *Davis* made clear, when it enacted FELA, Congress did not intend to abrogate entirely the concept of proximate cause and to substitute the notion that any negligent act that can be linked to a chain of events ultimately resulting in an injury justifies a finding of liability. Moreover, no intervening events between the *Davis* and *Rogers* decisions call into question the continued validity of the former holding. The phrase "in whole or in part" has been part of the provision establishing a cause of action under FELA since the statute's enactment. And, Congress has taken no action to impel a reexamination of FELA, or to justify a judicial retreat from the common law concepts which Congress engrafted onto FELA in 1908.

What then accounts for the expansive interpretations of causation that courts have read into FELA? The court below suggested that *Rogers*' alleged abrogation of the *Davis/Reetz* standard of causation was a reaction to amendments to FELA enacted in 1939.[12] The *Rogers* opinion discussed the 1939 amendments, implying that they motivated this Court to undertake a supervisory role in assuring that conflicting evidence on causation be evaluated by the jury in virtually all cases. 352 U.S. at 509-10. However, *Rogers* never suggested that the 1939 amendments required a reexamination of the causation standard under FELA, for the simply reason that they did not.

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[12] "The *Rogers* Court adopted this relaxed standard in order to effectuate Congress' intent in amending FELA in 1939." 330 F.3d at 434. *See also Morrison v. N.Y. Cent. R.R.*, 361 F.2d 319 (6th Cir. 1966), stating that a charge to the jury on causation was consistent with 1939 amendments to FELA.

While the 1939 amendments were intended to ease the path toward recovery by FELA plaintiffs, they did not purport to address, let alone modify, the standard of causation. Adding a provision to section 1 of FELA, the 1939 amendments expanded the scope of FELA's coverage so that workers would no longer have to prove they were engaged directly in interstate commerce at the time they were injured in order to qualify for recovery under the statute. Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.[13] In addition, in 1939, Congress amended FELA to eliminate the defense of assumption of the risk in all cases. *Id.*[14] The 1939 amendments also increased the statute of limitations under FELA from two to three years, *id.* at § 2, and prohibited railroads from establishing and enforcing rules which penalized employees for giving information concerning an accident to the injured person or his representative. *Id* at § 3. Tellingly, a railroad employees representatives did not believe that Congress had eliminated the need for employees to prove proximate cause when it enacted FELA in 1908, nor did he urge Congress to do so in 1939. In testimony before the House of Representatives, the General Counsel of the Brotherhood of Railroad Trainmen commented that it was unnecessary to add the word "proximately" to a provision of the act, explaining that such language would be "pure surplusage, because unless the

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[13] This amendment added the following language:

> Any employee of a carrier, any part of whose duties as such employee shall be in furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

[14] Previously, the assumption of the risk defense was eliminated only in cases where a safety statute had been violated.

negligence proximately caused the injury there can be no recovery."[15]

Inasmuch as the 1939 amendments to FELA did not address causation, the standard of causation under FELA at the time of the *Rogers* decision was identical to the standard originally intended by Congress in 1908, and interpreted by *Davis* and other cases of that era: what was insufficient causation to support liability in 1908 or 1923 was also insufficient in 1957 when *Rogers* was decided, or in 2003 when the court below issued its opinion. Thus, the court below misread the law when, on the basis of *Rogers*, it overruled *Reetz*, a case which simply followed and applied *Davis* and similar decisions of this Court.

II. THIS COURT SHOULD TAKE THE OPPORTUNITY TO CLARIFY ITS DECISION IN *ROGERS* BECAUSE LOWER COURTS CONTINUALLY HAVE RELIED ON *ROGERS* TO MAKE SUBSTANTIVE CHANGES TO FELA

In addition to resolving the deep conflict among the lower courts regarding the proper standard of causation, *see* Pet. at Part II, review of this case would provide an opportunity for this Court to clarify *Rogers*, as continued misinterpretations of that decision has become the basis for lower courts to announce substantive changes to FELA which depart markedly from Congress' intent.[16] The *Rogers* decision addressed only the question of causation, and at that, only the

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[15] *Hearings on H.R. 4988 and H.R. 4989 Before the Senate Comm. on the Judiciary*, 76th Cong., 1st Sess. (1939) (statement of Tom J. McGrath, General Counsel, Brotherhood of Railroad Trainmen).

[16] This Court has granted *certiorari* to address claims that the lower courts misconceived the meaning of a prior Supreme Court decision. *See e.g.*, *Wilkinson v. United States*, 365 U.S. 399 (1961).

question of submissibility to the jury.[17] However, the cumulative effect of lower court decisions that have read far more into *Rogers* has been drastically to change the landscape under which FELA cases are litigated.

Some courts have converted the *Rogers* holding from a test for a jury case to a substantive standard of causation on which the jury is to be instructed. *E.g., Oglesby v. Southern Pac. Transp. Co.*, 6 F.3d 603, 606-08 (9th Cir. 1993); *Page v. St. Louis Southwestern Ry. Co.*, 312 F.2d 84, 89-92 (5th Cir. 1963). Other courts, no doubt to effectuate FELA's humanitarian purposes, and through a subtle rearrangement of its language, have held that *Rogers* establishes a standard of care that differs qualitatively from ordinary negligence, that of "slight" negligence. "If the defendant's negligence, however slight, plays any part in producing plaintiff's injury, the defendant is liable". *Beeber v. Norfolk Southern Corp.*, 754 F.Supp. 1364, 1372 (N.D. Ind. 1990)(citing *Rogers*); *Walsh v. Consolidated Rail Corp.*, 937 F.Supp. 380, 382 (E.D. Pa. 1996)("FELA imposes a stringent duty of care. 'Slight negligence necessary to support a FELA action, is defined as a failure to exercise *great* care . . .'"); *Pry v. Alton & Southern Ry. Co.*, 598 N.E.2d 484, 499 (Ill. App. 1992) (Under FELA "[o]nly slight negligence of the defendant needs to be proved . .").

Despite numerous holdings by this Court and others that the standard of care under FELA is common law ordinary negligence, *Gottshall*, 512 U.S. at 543; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944),[18] under the influence of

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[17] "This Court granted certiorari to consider the question *whether the decision invaded the jury's function.*" 352 U.S. at 501. (emphasis supplied); "At best, uncertainty as to the facts arises from the petitioner's testimony, and in that circumstance not the court, *but the jury*, was the tribunal to determine the fact." *Id.* at 504. (emphasis supplied)

[18] *See Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997), holding that the employer's duty of care under FELA is ordinary

Rogers lower courts have moved FELA closer to being a workers' compensation law and railroads to being insurers of their employees' health and safety. *Williams v. Long Island R.R.*, 196 F.3d 402 (2nd Cir. 1999)(The Second Circuit construes FELA "as creating a relaxed standard for negligence and causation." *Id.* at 406); *Cent. of Georgia v. Kelson*, 505 S.E.2d 803, 808 (Ga. App. 1998) (only slight negligence, defined as a failure to exercise *great* care, is necessary to support a FELA action). In *Ackley v. Chicago and North Western Transp. Co.*, 820 F.2d 263 (8th Cir. 1987), where the plaintiff's right to a jury determination resulted in an adverse outcome, FELA was interpreted to require that a new jury try again. Despite reference to the"emphasis to be placed on the jury's role under FELA," the court reversed a jury finding for the railroad, holding that it is improper to instruct the jury that a railroad may assume that its employees will exercise reasonable care. ("[D]uty to provide a reasonably safe place to work . . . is broader under [FELA] than a general duty of care." 820 F.2d at 267).

Various readings of *Rogers* also have muddied the concept of foreseeability under FELA. *Syverson v. Consolidated Rail Corp.*, 19 F.3d 824 (2nd Cir. 1994) (Holding that "under FELA and the case law construing it, the common-law negligence standards of foreseeability and causation normally applied in summary judgment are substantially diluted." *Id.* at 825); *Mitchell v. Missouri-Kansas-Texas R.R.*, 786 S.W.2d 659 (Tex. 1990) ("Foreseeability is thus not part of the causation standard as to negligence in FELA cases." *Id.* at 661). *But cf. Nivens v. St. Louis Southwestern Ry. Co.*, 425

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negligence, and recounting how courts had, over the years, (mis)-interpreted *Rogers* as establishing the concept of slight negligence. *Id.* at 335-38; *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3rd Cir. 1995), holding that FELA incorporates the concept of ordinary negligence, and questioning whether the concept of "slight care" even exists in the law. *See also Peyton v. St. Louis Southwestern Ry. Co.*, 962 F.2d 832, 833 (8th Cir. 1992).

F.2d 114 (5th Cir. 1970), finding that while *Rogers* called for a "less demanding burden of proving causal relationship", nonetheless found that "foreseeability is 'an essential ingredient' of negligence under the Act." 425 F.2d at 118.

Nearly half a century after it was decided by this Court, *Rogers* has become a malleable tool which lower courts have utilized to implement what they believe are beneficial results from the standpoint of public policy, *i.e.*, assurance that rail employees suffering work-related injuries receive compensation. However, by enacting and retaining a negligence law, Congress chose not to provide assurances of recovery in all cases of job-related injuries in the rail industry.

In a revealing passage, one court described the state of adjudication under FELA, all but admitting that, despite protesting to the contrary, courts have amended FELA to make it resemble more a workers' compensation law than a tort statute (albeit one in which awards are not subject to the caps and limits that characterize true workers' compensation laws):

> Having accorded the customary, albeit somewhat psittacistic, deference to the non-insurer aspect of the FELA defendant, we will now proceed to discuss that statute as it is. Before doing so, we observe that while the FELA in its terms does not purport to border on a workman's compensation act, certain parallelism may be found. We will not assume that Congress is unaware of the judicial gloss that the Act has received. If the Act as it has been interpreted and applied does not correctly reflect what was intended by the legislative branch then the change must be made there. The duty of this court is to follow what is now well-established authority.

Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243, 1246 (7th Cir. 1974). Notwithstanding this candid assessment of FELA jurisprudence, it remains the proper role of the courts faithfully to interpret a statute as Congress intended, not as they wish the statute to have been drafted, with the fallback

that the onus is then shifted to Congress to amend the statute if it is not happy with the interpretations given.

Although some courts continue to be faithful to Congress' intent,[19] to many lower courts, the elements of negligence under FELA blend together, imposing an overall "slight" burden on plaintiffs. This erroneous interpretation of FELA is so entrenched among many lower courts–with a consequent pronounced effect on FELA litigation–that liability is a foregone conclusion in many jurisdictions in all but a very few FELA lawsuits. Review of this case will provide this Court with a long overdue opportunity to clarify *Rogers* and thereby assure that federal and state trial and appellate courts no longer undertake an improper role in interpreting FELA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November 17, 2003

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[19] *See e.g., Williams v. Southern Pac. Transp. Co.*, 813 F.Supp. 1227, 1230 (S.D. Miss. 1992) ("A plaintiff need not establish that the defect was the sole cause of injury [citations omitted], as contributory proximate cause is sufficient."); *Chapman v. Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991) ("To recover under the Federal Employers' Liability Act, an employee must prove . . . that the alleged negligence is a proximate cause of the employee's injury.")